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AN  
APOLOGIE:  
OF, AND FOR

Sundrie proceedings by Iurisdiction  
*on Ecclesiasticall, of late times by*  
some challenged, and also di-  
versly by them impugned.

(\*)

*Lex, Iustitia: Iustitia Reipub. basis.*

Imprinted at London.

*Anno Dom. 1591.*





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Several proceedings by sundry  
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Lex Justitiae: Justitia Regis dicitur.

Printed at London.

anno Dom 1721.



# THE FIRST PART.

## The Preface, conteining the Occasion, and generall distribution of this Treatise following.



**H**E induors of such disturbers as haue bene the chiefeſt ſtaies of a further propagation of the Goſpell, and the onely ſtaies of her Maieſties happie reformation, haue reſted moſt in aduancing a newe founde diſcipline, and in diſcrediting the preſent gouernment Eccleſiaſticall, by their ſpeeches and writings. The later whereof they haue gone about, aſwell by impugning the callings and forme of gouernment Eccleſiaſticall, (as if they were contrarie to Gods word) as alſo by defacing the perſons of the Gouernors, with vnchriſtian gybes, contumelies, and other indignities. But theſe ſucceeding not to their wiſh, nor ſorting to that effect they purpoſed, ſundry of them haue entred into, and purſued a more politike courſe: For by themſelues, and others (more ſimple) excited cunningly by them, they challenge diuerſe receiued proceedings in Courts Eccleſiaſticall, not to be iuſtifiable by lawe: pretending nowe their eſpeciall griefe to reſt herein, for that they are dealt with and oppreſſed contrarie to lawe, euen as if they did carry a principall and zealous care to haue all her Maieſties lawes duely obſerued.

By whoſe frequent clamors, ſome very graue, wiſe and learned (no way affected to their other fanſies) either not being well informed of proceedings Eccleſiaſticall, or not weying (for want of leaſure) certaine pointes doubtfully reported in the bookeſ of common lawe ſo thoroughly as their great learning therein doeth affoord: in a kinde of commiſeration (for ſo I interprete it) towards ſome of thoſe who ſeeme diſtreſſed, and to be otherwiſe well meaning men, haue lately called into queſtion diuerſe proceedings Eccleſiaſticall, both for matter, and for circumſtance or maner, that they are contrarie to the lawes of this Realme.

Yet all of them doe not iumpe in the ſelfe ſame opinions hereafter touched. For they are ſeuerally holden by ſeueral men, the moſt whereof are ſtood in by men of meanest place and reckening in that ſtudie, and ſuch as are knowne to be ouer much addicted to factious innovations. But all the challengers whatſoeuer (for contrarietie vnto the lawes of the Realme one-



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ly, so farre forth as they are hether to comen to knowledge) may fitly be reduced into this order and summe. They tend to the challenging of proceedings Ecclesiasticall, done either by those who proceede by her Maiesties immediate Commission, who are either Iudges delegates (dealing in matters onely betwixt partie and partie brought before them by appellation) or Commissioners in causes Ecclesiasticall (seruing especially for punishing of crimes and offences) or else such as be executed by those, who deale in ordinarie Iurisdiction.

Those exceptions that touch the very matter and obiekt of Ecclesiasticall Iurisdiction, doe in very deede tende, either to the whole taking away of that Ordinarie Iurisdiction (as where it is affirmed, that no Canon, constitution, nor ordinance prouinciall whatsoeuer, may now be put in vre, without her Maiesties expresse assent first had to execute the same :) or else doe reach to the taking of it away but in part.

Those opinions that tende to the abridging of it but in some part, doe goe about it partly by way of excluding Ecclesiasticall Iudges from the handling of certaine matters, (as by holding that none Ordinarie may cite any whomsoeuer, but in causes Testamentarie and Matrimoniall, and that no Lay man ought to be cited or summoned to appeare before any Iudge Ecclesiasticall, to take an othe in any other cause then Testamentarie or matrimoniall :) And partly by deriuing them from the conisance Ecclesiasticall unto other Courts: (as that the iudgement of heresie nowe lieth rather in the Common lawe, then in the lawe Ecclesiasticall :) and some other of them (being defended by the same men that holde the next precedent opinion) doe tende both to the excluding of Courts Ecclesiasticall, and to the diuerting of such causes another way, as that nothing nowe can be adiudged heresie, but according to the statute. 1. Eliza. cap. 1.

As for the exceptions (pretended to be taken from the lawes of the Realme) against the circumstances, or maner of proceeding in Courts Ecclesiasticall, they doe either concerne such points as goe afore, and are preparatories to the suite (and such is this: that, the Q. Maiestie cannot giue, nor any man receaue authoritie to vse any other processe in matters Ecclesiasticall, then by citation :) Or doe touch the manner of entring into the suite, as that an Ecclesiastical Court may not proceede without accusation or presentment, and that Lay men may not be cited *ex officio*, in any cause but Testamentarie or Matrimoniall: Or they concerne the manner of handling, and proceeding in the suite, as that, If a matter be duely presented against a man, he may not be examined vpon his othe: whereunto some (belike meaning to qualifie and distinguish



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*stingish it) doe adde this, viz. in a matter of incontinencie or such  
caule: and that, no man is bound to declare any matter against ano-  
ther, except some be an accuser: Or doe concerne the sentence or iudge-  
ment of the Court Ecclesiasticall, as that by none Ecclesiasticall autho-  
ritie a man may be deprived of his benefice being his freehold, being  
not indicted, and no suite of partie offered against him: Or else doe re-  
spect the execution of the iudgement: as that the Queenes Maiestie  
cannot giue, nor any man may take authoritie of her, to vse any co-  
ertion for any matter Ecclesiasticall, but excommunications and  
such like: and that therefore a man may not be punished by impris-  
onment or fine, for or in any matter Ecclesiasticall: and lastly that a  
man that standeth aboue fortie daies excommunicate, may no way  
be punished, but vpon the writ *De excommunicato capiendo*.*

But others that be indeede professed dealers for an innoation in the  
Church, (when they are coruented before authoritie,) doe most greedily  
take holde of these exceptions from the Common lawe, against iurisdiction  
Ecclesiasticall, and doe alledge also sundry others, yet pretending to ground  
themselves for both, not alonely vpon the lawes of the Realme, (as those doe  
of whome we hitherto haue spoken,) but vpon Gods lawe also, the Ciuill,  
the Canon, or Ecclesiasticall lawe, and vpon equitie and reason: Not be-  
cause they were perswaded by the pregnancie of any of these grounds so to  
thinke, but hauing embarqued themselves in this common quarrell, viz. to  
impugne the gouernment Ecclesiasticall of this Realme, in all things to  
their utmost: haue first (as is probable) entred into the opinions, and af-  
ter haue sought some colour to vernish them ouer with, wherefoener they  
could hit of them. Which their exceptions peculiarly framed by the profes-  
sed Innouators, and their owne proofes both for them, and for these also a-  
fore recited, (which were put into their heads by some Lawyers,) shall (God  
willing) then be distributed and layed foorth, when we come to the hand-  
ling of them, because another place is more apt for that purpose, then this  
generall Preface.

These opinions of late ringing sundry times in mine eares, and seeming  
to me to be diuersly mistaken, I called to memorie (so neere as I could)  
what, and where I had read any thing touching them: whereupon turning  
some bookes, and confusedly noting what I found, I was more and more  
confirmed in my former conceits, sufficient for mine owne perswasion.

Nowe because you pretend not to haue trauailed in these kind of questi-  
ons, and haue so earnestly importuned me to take some paines therein: I  
haue bene content for your owne onely priuate reading and satisfaction, to  
plot my simple conceits into this order as you see. For owing very much vnto

you,



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you, and therefore not daring to deny you so small a matter, I haue (with that little leasure I could get) hazarded rather to haue want of iudgement in me, then lacke of good will by you to be censured. Meaning in the first part of this Treatise to pursue the particular order here-aboue comprised: Saving that those foure recited opinions which touch the circumstances of entring into a suite Ecclesiasticall, and the manner of proceeding in it, I shall be forced (contrarie to the naturall methode) to put after all the others, as falling more fitte in the second principall part of this Treatise, by reason of coherence with that matter there to be handled, and seruing for more plaine understanding of that later part.

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The





# The Chapters and Contents of the first part.

1. **T**hat a generall royall assent is not required to the executing of every particular canon.
2. The particular distribution of all other causes to be proued to be of ecclesiasticall conusance, besides testamentarie or matrimoniall.
3. That matters in the former chapter adioyned to testamentary and matrimoniall causes (though properly they be not of testament or matrimony) are of ecclesiasticall conusance, and how farre.
4. Generall proofs out of statutes, that sundry other causes besides testamentary or matrimoniall, are of ecclesiasticall conusance.
5. That suites for title of Benefices upon voidance or spoliation: likewise that suites for tithes, oblations, mortuaries &c. for pensions, procurations, &c. are of ecclesiasticall iurisdiction, is proued by statutes.
6. That suites for right of tithes belong to the ecclesiasticall iurisdiction. and how farre, is shewed out of the books and reports of the common law: so of places of buriall and churchyards: and of pensions and mortuaries.
7. Of right to haue a Curate: and of contributions to reparations, and to other things required in Churches.
8. Proofs in generall, that sundry crimes and offences are punishable by ecclesiasticall iurisdiction: and namely idolatry, heresy, periury, or lēſio fidei, and how farre the last of these is there to be corrected: also of disturbance of diuine seruice, or not frequenting of it, and neglect of the Sacraments.
9. That simony, vsury, defamation or slander, beating of a clerke, sacrilege, brawling or fighting in Church or Churchyard, dilapidations or waste of an ecclesiasticall liuing, and all incontinency are punishable by ecclesiasticall authority, and how farre.
10. That the crimes hitherto not spoken vnto, and here reckoned, be also of ecclesiastical iurisdiction to punish: and proofs that a-  
nie



- nic subjects, lay or other may be cited in any cause ecclesiasticall.
- 11 Of a prohibition, what it is: where it lieth not, and where it doth: and how it ceaseth by a consultation: and of the writ of Indicavit.
  - 12 An analysis or unfolding of the two speciall statutes touching Premunire, with sundry questions & doubts about that matter, requiring more graue resolution.
  - 13 That lay men may be cited to take othes in other causes, then testamentarie or matrimoniall.
  - 14 The grounds of the two next former opinions examined and confuted.
  - 15 That iudgement of heresie still remaineth (at the Common law) in iudges ecclesiasticall: and that the prouiso touching heresie, in the statute 1. Eliz. cap. 1. is onely spoken of ecclesiasticall commissioners thereby authoris'd.
  - 16 That by the statute, her Maiestie may commit authoritie, and they may take and vse for ecclesiasticall causes, attachments, imprisonments and fines.
  - 17 That an ecclesiasticall person may be deprived of his benefice without indictment or prosecution of party: and that after fortie dayes, an excommunicate person may be otherwise punished then upon the writ De excomm. capiendo.



# AN APOLOGIE OF CERTEINE PROCEEDINGS IN COVRTS ECCLESIASTICALL.

## CHAP. I.

*That a severall royall assent is not required to the executing  
of every particular Canon.*



**I**f no canon or constitution ecclesiasticall might now be put in v're, but such as her Maiesties expresse assent is first had vnto; then doe all their other opinions against the ordinarie iurisdiction ecclesiasticall stand in no stead, and might be spared, because this would serue to cut off al at once, which they shoot at. For none that exercise ordinarie iurisdiction haue hitherto had it in particularity (which by the oppugner seemeth to be meant) otherwise then by permission of law vnto euery of their proceedings. Neither in truth, for the infinitie of it, and trouble some nesse to procure such assent from her Maiestie for euery particular matter and diocesse of this realme from time to time, were it possible to be vsed. Now if Ordinaries (from whom either mediately or immediatly appellations do lie vnto her Maiestie in the Chancerie) by reason of the want of such particular assent, vnto the execution of euery canon, shall (by this conceit) haue nothing to do; then cannot the Queenes delegates neither (to whom appellations from Ordinaries doe come) haue any thing wherein to bestow their trauell: and therefore this point seemeth first of all meet to be cleered.

The absurdity of this opinion (whosoever were the hatchers of it) will easily shew it selfe. For if matters testamentarie and matrimoniall (which they grant to be ecclesiasticall) right of tithes, and sundry other causes (which shall be also proued so to be) shall not nor can not, by reason of this want, be dispatched (as now they are) by ecclesiasticall iurisdiction, and yet can not be dealt in by any other authoritie, according to any law now in force: then is there a maine imperfection in the policie of this Common weale: For men to haue a right, and yet no likely or ready meane to come by it: and for grosse offences to be committed (that are by law punishable) and yet no man sufficiently authorized, to execute such lawes.

The iudgement of whole parliaments kept in severall Kings and  
Queenes



25. H. 8. cap. 19.

37. H. 8. cap. 20.

32. H. 8. cap. 7.

34 &amp; 35. H. 8. cap. 19.

1. Ed. 6. cap. 2.

1. Mar. cap. 3.

1. Eliz. cap. 2.

5. Eliz. cap. 13.

5. Eliz. cap. 9.

Queenes reignes (since that act, whereupon this fancie seemeth to be grounded) so many as haue had cause to speake of the iurisdiction ecclesiasticall, do also fully conuince it: for the statute for delegates vpon appellations doth argue, that Ordinaries might (without further leaue obtained, as in former times they did) execute their iurisdiction ecclesiasticall. For if there were to be no more ordinary proceedings, till the king should giue his assent to the execution of euerie canon; for what vse should appellations from the decrees and iudgements of Ordinaries be there provided for? Likewise two statutes were not long after provided in assistance of iurisdiction ordinarie, and for the better and speedier recouerie of tithes in courts ecclesiasticall, according to the course of the ecclesiasticall lawes in that behalfe. And the like was also enacted for recouerie of pensions, procurations &c. withholden.

In the time of *king Edward the sixth*, in a statute (since repealed by *queene Marie*) a great number of particuler causes of iurisdiction ecclesiasticall are there (by the way) rehearsed, that Ordinaries and other ecclesiasticall iudges might and did then deale in.

In the time of *queene Mary* (before the supremacie was giuen vnto the Pope) the act for not disturbing of diuine seruice or preaching, reserueth the iurisdiction that Ordinaries then had, for punishment thereof by lawes ecclesiasticall, ouer and aboue the penalties (of new) thereby inflicted.

In the *Queenes Maiesties* time that now is, by the act for vniformitie of Common prayer, *Ordinaries &c. may enquire &c. and punish the violations of that act by censures &c. as heretofore hath bene used in like cases by the Queenes ecclesiasticall lawes.*

The statute *De excom. capiendo*, reckoneth vp particularly diuers crimes and offences ecclesiasticall, punishable by that iurisdiction, which were hindered much from the due punishment that appertained, for want of due execution of that writ *De excom. capiendo*, and therefore prouideth remedie therein: which necessarily argueth the continuance and approbation of execution of iurisdiction ecclesiasticall by Ordinaries, without further obtaining of leaue.

By the statute against periurie made at the same time, it is prouided that it should not extend to courts ecclesiasticall: but that offenders in periurie, or subornation in a court ecclesiasticall, *shall and may be punished by such vsuall and ordinarie lawes, as heretofore haue bene, and yet are used and frequented in the said ecclesiasticall courts:* which proueth the vsuall practise of iurisdiction ecclesiasticall hitherto vsed (without



(without any speciall assent) to be lawfull.

The statute against vsurie prouideth, that such vsurie as is aboue ten pound in the hundred by yere, shall (notwithstanding the other penalties there newly inflicted) be also punished and corrected (as in times past) by the lawes ecclesiasticall. And by the statute of dilapidations, the remedies that by the lawes ecclesiasticall were (afore) giuen against executors and administrators of incumbents, are there extended also to donees and alienees, to be by the same authoritie dealt with. In the which clauses of statutes, there is no repeale of any former particular statute or law, nor any generall *non obstante* conteined. And therefore, if those parliaments had beene of this iudgement, that no *Canon* might now be put in vre, without the royall assent first obtained, there would haue bene added these, or some like words, v<sup>z</sup>. *They the said Ordinaries first obtaining the royall assent for the putting in vre of such canon, as they minde in that cause to proceed by: that thereby (without all scruple or danger) their proceedings (so appointed to them) might haue bene warranted.* But being altogether needlesse, it is no maruell though it were omitted. For can any man doubt (if it were needfull) but that there is a sufficient royall assent had, when as it is giuen to the whole act before it can passe for a law?

13.Eliz. cap.8.

13.Eli.cap.10.

Lastly, the same statute out of which (as I coniecture) this opinion was stirred vp, doth establish all canons which be not contrariant nor repugnant to the lawes, statutes, and customes of this realme, nor to the dammage or hurt of the kings prerogative royall, that they shall now still be vsed and executed as they were afore the making of that act, till they should be viewed &c. by the 32. persons &c. which is not hitherto done: but such were vsed afore, without any expresse or particular royall assent from time to time obtained: and therefore &c. which to exact, were (in very deed) to bring in a quite disuse of all ordinarie iurisdiction in stead of vsing it: which hitherto (from planting of Christianitie) and in all succeeding times hath neuerthelesse bene practised.

25.H.8. cap.19.

This opinion as an arrow shot vnaduisedly at the bishops, glanceth off them, and woundeth very deadly the fauourers of the new discipline (in whose behalfe it was framed) for they are so farre from taking expresse leaue of the prince to put euery of their constitutions ecclesiasticall in vre, that they holde, her Maiestie hath nothing to do to make or establish any Church lawes. And the clause for vse of such former *Canons and Constitutions synodall* afore mentioned, as they were vsed afore that time, will not helpe the exercise of their syn-



dicall constitutions made long after in a Conuenticle, called together by their Moderators writ. But belike (when they set vp) the statute of submission of the Clergie shall be turned into a statute of submitting the Princes scepter to the rule of their Presbytery, in all Church matters.

27.H.8.ca.19.

The chiefeft colour and pretence for this opinion, is taken (as I coniecture) out of the reuiued statute made in k.H. the 8. time of submission of the Clergie. But the words thereof doe plainly discouer the weakenes of such collection. for it is not enacted simply, that they shall *not put in vre &c. any constitutions &c.* but according to their aboue said submission and petition, which was, that they would not enact nor put in vre any newe Canons, &c. in their Conuocation without the Kings royall assent and authoritie in that behalfe. Otherwise there were a flat contrarietie in the selfe same Acte, by reason of the last prouiso thereof (next afore repeated) where Canons already made (so they haue the qualities thereby limited) are appointed to be vsed. For it is there saide, *shall be nowe still vsed and executed as they were before the*

27.H.8.ca.15.

*making of that Acte.* And where in the 27. yeere of the saide king, the same submission and former Acte is repeated, there in the very bodie of the statute (touching not putting in vre of Canons, &c.) the same modification (as afore) is reteined, viz. *According to the sayde submission and petition of the Clergie*, which concerneth onely newe Canons. For of those that were then already made, the very selfe same prouiso (as afore is set downe) appointeth, that *they shall still be vsed & executed as they were before the making of either of those acts.* Which was, without any such expresse assent (as by this opinion is enforced) and is therefore neither requisite nor almost possible.

1.Eliz.ca.1.

I haue also heard some alledge the clause of the statute made for vniting of all Ecclesiasticall Iurisdiction to the Crowne, against the exercise of that Iurisdiction by any Ordinaries: which (to mine vnderstanding) is a very simple collection. Belike they meane, that no Iurisdiction is vnited to the Crowne, but there must be a Commission vnder the great seale to warrant the execution of it, vnto him that is to exercise it. Then must euery Steward of a Leete, euery Constable, and sundrie other Officers be driuen to procure like warrant for the execution of their temporall offices. for (I trust) it will not be denied by these men, but that all Temporall authoritie and Iurisdiction is by lawe also vnited to the Crowne.

In deede this reason would serue against either Iurisdiction, if they were not deriued and claimed from the Crowne, but from some other



ther authoritie immediately, as the Popish Clergie did theirs from God, by the meanes and direction of the Pope. But another Parlia- 8. Eliz. ca. 1.  
ment sheweth, howe farre this collection is from the mind of the makers of that lawe: for that very clause (together with her Maiesties letters patents directed foorth from time to time for confirming and consecrating Archbishops and Bishops) is there brought, as a strong prooffe *without scruple and ambiguitie*, that the authoritics and Iurisdic- tions by them executed, be thereby given vnto them from her Ma- iestie. And therefore this opinion doeth remaine destitute of any ground of lawe.

## C H A P. 2.

*The particular distribution of all other causes to be prooued to be of Ecclesia-  
sticall conusance, besides Testamentarie or Matrimoniall.*



He next opinion, viz. *That by the lawes of this realme none Ordinarie may cite any whomsoever, but in causes Testamentarie or Matrimoniall*, hath not so large a reach, nor draweth so great a compasse as the former. For this leaueth some ordinarie Iurisdiction Ecclesiasticall in these two cases; where the other (vpon the matter) sweepeth away all. But if this be simply true, then the former must needs be false. For if (by lawe) an Ordinarie, without more a doe, may cite men in these two cases, then may some Canon by lawe, &c. be put in vre, without any further royall assent to execute the same.

But if it be prooued true, that (*by the lawe of the land*) in some causes besides Testamentarie or Matrimoniall, an Ordinarie may cite: Then this opinion, that in no causes besides Testamentarie or Matrimoniall, an Ordinarie may cite (being the contradictorie thereof) must needs (by rule of reason) be prooued false. It will not be denied by any, but in what cause soeuer an Ordinarie may lawfully deale, in that (if neede be) he may vse citation. For all matters done by Bishops (who onely be immediate Ordinaries) either belong to their *order and degree*, or to their *Iurisdiction*. Their *Iurisdiction* is of two sortes: either *voluntarie*, that is, when those whome they deale with, doe not stande against it: (and such for the most parte, are institutions, probate of Wils, and committing of administrations) or *contentiosa iurisdiction*: that is in such matters, against which some partie doeth stande, and doeth oppose himselfe. Nowe if it be *contentiosa iurisdictionis*, whether it be for a *right there demandable*, or *determinable*, or else for a *crime*



crime there punishable, (which are the heades of all *litigious Iurisdiction Ecclesiasticall*) it cannot be entended, that *pars rea, is contra quem res agitur*, the partie to be dealt against, will *gratis* without processe appeare, and from time to time attend: except it happen sometimes by collusion with the plaintife. And in this respect (amongst others) it is said, that *iudicium redditur inuitum*, and *Reus* is called *pars fugiens*, the partie presumed to come thither against his will, and willing enough to be gone, if he might. Therefore if any cause, besides those two, shall be prooued such, as the Ordinarie may lawfully deale in; it will followe, that in such a matter also hee may vse a citation to call him. *Dato principali, necessaria adiacentia veniunt in consequentiam.*

Aristot. in lib.  
poster. Analyt.

But that an Ordinarie may deale in sundry other causes besides these two, it shall appeare both by statutes (which are the iudgements of the whole Realme) and by the iudgements and vncontrolled opinions reported in the bookes of the Common lawe. In discourse whereof, will appeare not onely *πῶς*, that the matter is so, but also *τὸ διόν, καὶ ὁμοίως π*, the reason why, and in what manner and sorte it is determinable or punishable there: being three principall questions to be opened, for the perfect knowledge of any thing that is to be handled: and seruing in these controuersies, to some further vse and profite, which may lighten you in the length of the disputation.

Pursuing therefore the two former heads of that part of Ecclesiasticall Iurisdiction: the matters by *litigious Iurisdiction demandable and determinable*, are either such, as are yeelded to be meere Ecclesiasticall (by the authors of this opinion) viz. *Testamentarie* and *Matrimoniall*: to the first whereof (for affinitie sake) I adde *last Willes*, (such as may not be termed *Testaments*,) *Codicils*, *Legacies*, *Administrations*, and *Sequestrations* of the deads goods, (commonly called letters *ad colligendum*;) and to the later, I ioyne *diuorces*, *restitution of matrimonie*, and *suites for goods or chattels promised with a woman in marriage*: or else they are such others (claimed to be Ecclesiasticall) as remaine still (by this opinion) in controuersie. All which (I thinke) may be comprehended, vnder the generall terme of *reliqua iura Ecclesiastica*. And these are either some duetie arising at first vpon exercise of *voluntarie Iurisdiction*, and yet by deniall made *litigious*, and such be *procurations*, *pensions*, *Synodals*, *Pentecostals*, *indemnities*, *fees for probates*, &c. or growing due vpon exercise of *litigious Iurisdiction*: and these are either due to the Iudge himselfe (as *fees of citations*, *fees of sentences*, &c.) or are due to others attendants in the Court, (as fees



fees of *Aduocats, Proctors, Registers, Apparitors, &c.*) or else they are such as are due to Ministers in the Church, that haue no title, as *wages for a Curate, or a Clerke, or vnto a Minister that hath title.* And this right of a Minister that hath title, toucheth either the whole *title and interest* in and to his *benefice*, or else toucheth but his maintenance & liuing. His *interest and title* tendeth either to *attaine* it when he pretendeth iust title to it, or to *reteine* it being in his possession, or else to *reouer* it being bereaued or spoiled of it. The dueties which concerne Ministers maintenance, are *tythes of all kinds, Oblations, Obventions, Mortuaries, Churchyard or place of buriall, &c.* Or lastly, it is something, that is due to a whole Parish, as to *haue a Chapleine found, or diuine seruice, or Sacraments administred amongst them, or for a Parishioner to be contributorie* with the rest to reparations of the Church, to seates, to bells, to the buying of bookes, of Vtenfiles, or of other ornaments, and requisites in the Church.

Concerning crimes and offences claimed to be punishable by *Iurisdiction Ecclesiasticall*: they may all (I thinke) be reduced to some of the three heads, touched by *S. Paul*: viz. as being contrarie either to *Pietie vnto God*, to *Iustice towards our neighbour*, or *Sobrietie towards our selfe*. Against *Pietie to God-wards*, are these: *blasphemie, swearing, idolatrie, heresie, error in faith, schisme, Apostasie from Christianitie, not frequenting publike praier, neglect of the Sacraments, periurie in an Ecclesiasticall Court or matter, disturbance of diuine seruice, and such like.* Contrarie to *Iustice* are these: *Simonie, vsurie, diffamation, subornation of periurie in a Court Ecclesiasticall, violence to a Minister, sacriledge, dilapidations, fighting or brawling in Church or Churchyard, and such like.* And against *Sobrietie* are these: all *Incontinencie* (not made death by the lawe of the Realme) whether committed with one which is of his kindred in blood, forbidden either in generalitie, or by some of the degrees *Leuiticall*, or with one of his alliance so forbidden, both which are called *incest*: or committed by such whereof the one is married, which is *adulterie*: or where the one of them hath bene married, termed by some *stuprum*: or where both be single, termed *simplex fornicatio*: or whether it be *marrying of two wines, or being married vnto two husbands at once*, which is called *Polygamie*: *Sollicitation of a womans chastitie, drunkennes, filthy speech, and such others.*

Chap.



## CHAP. 3.

That matters in the former chapter adioyned to testamentary and matrimoniall causes (though properly they be not of testament or matrimony) are of ecclesiasticall consuſance, and how farre.



Ouching such as I haue adioyned for neereneſſe of qualitie vnto matters *testamentarie*: Firſt a mans *laſt will* (whereby *legacies* be giuen, but none is therein made *executor*) cannot be called a *testament*. The like is to be ſaid of a *codicill*: & a *legacy* though it be giuen by *testament*, yet may it alſo be giuen by ſuch a *laſt will*, and can (in neither caſe) be properly called a matter *testamentarie*, becauſe it is but *Delibatio hereditatis* or *ſucceſſio particularis*. And by ſuite for a *legacy*, neither the *testament* commeth directly & principally to be proued, nor yet to be impugned. But much leſſe may *administrations* and *letters ad colligendum*, be accounted matters *testamentarie*, becauſe they are committed when a man dieth *intestate*, or *per viam inteſtati*. Beſides that, the courſe of granting *adminiſtrations* was not at the common law, but came in by ſtatute, long after this writ of *Prohibition* (whence this controuerſie ſpringeth) is pretended to haue bene framed. As for *diſorce* (which by like reaſon I ioyned with matters of *matrimony*) becauſe it tendeth to the overthrow and diſſolution of *marriage*, it can not be termed properly a matter of *matrimony*: though no man can be *diſorced* but which hath bene married, no more then blindneſſe may be called ſeeing, for that nothing can be truly and properly ſaid to be blinde, but ſuch as either once did ſee, or by nature of the thing ſhould haue eyes: *Prinatio enim preſupponit habitum*. This appeareth alſo by a ſtatute, where *diſorce* is contrediuided and reckoned as a diuers ſuite from a cauſe of *matrimonie*, 24. H. 8. cap. 12. Likewise *iactitation of marriage*, becauſe it tendeth (by the intention of him that bringeth the ſuite) to be cleered of a *matrimonie* or *contract matrimoniall*, that is pretended by the other partie, it can no more properly then the former be called a matter of *matrimony*. As for *goods or chattels that are promiſed with a woman in marriage*, who ſeeth not, that it is a meere circumſtance, nothing touching the validity or inuailidity of a *matrimonie*? yet neuertheleſſe (I take it) no man is ſo wedded to his opinion, that he will deny the cogniſance of theſe matters to belong to the Eccleſiaſticall iuriſdiction.

But I purpoſe to make the matter a little more plaine, and withall to ſhew, as well when and how ſome matters *testamentary* themſelues,



### Chap. 3. *proceedings in courts Ecclesiasticall.*

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selues, as the rest annexed to testamentarie or matrimoniall causes (which I finde touched in the lawes of the realme) do belong to the cognisance of an Ecclesiasticall court, and when and how vnto a Temporall court: beginning first with testaments, which are to be prooued before Ordinaries, saving in certeine places, where the lord in his Temporall court (by custome) prooues the testaments of his tenants.

Ma.H.3. Fita  
testa.4.

Touching executours, it is sometimes to be determined by the Common law, in what cases, and who may be made an executour: for a woman (by the common law) may make her husband executour of such things whereof she was executour to another before, or of a duttie due vnto her before conuerture, or of rent being behinde, upon a lease made vnto her for terme of life, or of a lease, or of any thing whereof the possession must be attained by action: but she can not make him executour of that which she hath in possession: for by the very entermarriage the propertie is in her husband: albeit, by the Spirituall law as well in the one case as in the other, she may make her husband executour: which (saith Tremayle and Frowicke) whether it be their law or no, is not to be disputed by the Common law, because we are ignorant and can not iudge what is their law. And if a man be condemned in costs in a court Ecclesiasticall, and after die, making an executour (by the opinion of Kingsmeell) it is as good reason to sue the executor in a Spirituall cause according to the Spirituall law, as to sue him for a temporall matter in the Temporall law. Else (saith he) when an amends is adiudged in a Spirituall court, and the partie dieth, the other should be without remedy, which were no reason: and none did gainsay it.

T.12.H.7.  
fol.12.

T.12.H.7.

But a man may not sue an executor in a Spirituall court, for the testators debt: albeit if the testator enioyne the executor to pay the debt to him, he may then sue for it in court Spirituall, because of the innuention and promise. And this sheweth how an executor may be sued or not sued in an Ecclesiasticall court. Now an executor may sue another in a Spirituall court touching his testatours goods, in this case. If a man devise or bequeath corne growing, or goods, vnto one, and a stranger will not suffer the executor to performe the testament for this legacie, he shall sue the stranger for it in a Spirituall court. But if a man take from the executors, goods bequeathed for this, the executor must use his action of trespassse, and not sue in the Spirituall court: for executors can not sue for the goods of their testator in a court Ecclesiasticall, but at the Common law. If a testament beare date at Caen in Normandie, and be prooued in England, the executor may upon such testament haue action.

H.6.H.3. refe-  
rence Firzh.  
tit.prohib.17.

T.4.H.3. refe-  
rence Fitzh.  
tit.prohib.11.

2.R.3.17.

T.18. Ed.2.  
testa.6.

Of legacies or devises it will be sufficient to touch a few points. In the books of the Common law it is set downe, that they shall be re-

37.H.6.pag.9.



H.B.H.3. ex  
Fitzh. tit.  
prohib. 19.  
46.E.3. fol. 32.

covered in a Spirituall court, and not in a court Temporall. Therefore if a termor of certēine land bequeath his crophe, and die, the Spirituall court shall holde plea thereof. Like wise, where one sued in court Christian, for goods devised by testament, which another claimed by deed of gift, and thereupon brought a prohibition, and shewed the deed of gift, and alleged withall, that the defendant was neither executor nor administrator: yet because it was by name of a legacie, it was adiudged to belong to the Spirituall court, by which it was to be determined; and the circumstances to be tried, whether the devise were good or not. And in respect a man hath such action against the executor for a legacie before the Ecclesiasticall Iudge, therefore the legatarie or devisee may not of his owne head take the goods or chattels devised to himselfe, out of the possession of the executor. And for this also especially, because the law doeth not binde that the legacies shall be assigned, payed, or delivered, until the debts of the testator be satisfied and payed. But because a frankfeutement or inheritance devised, is not demandable in an Ecclesiasticall court, but in the Temporall: therefore the legatarie (according to the devise) without further assignment or deliverie, may enter into them after the death of the testator.

M.10.E.4.9.

T.2.H.6.15.

Bracton, lib. 5.  
cap. 16.

Perkins tit.  
deuises.

31.E.3. cap. 11.

36.H.6.31. re-  
ferente Perk.  
tit. testa.

7.H.4.18.

Touching committing of administrations, by the very statute whereby they were established it is enacted, that where a man dieth intestate, the Ordinaries shall depute the next and most lawfull friends of the dead person intestate, to administer his goods: which deputies, as they have action against others in the kings court, for to recover the debts owing to the dead, so in that court there lieth action against them, for such as the dead did owe: but they are made accountable to the Ordinaries as executors be, in the case of testament &c. And when such letters of administration be shewed under the Ordinaries seale, or when a testament is so shewed, a man hath no direct transe against it in the Temporall court.

That to sequester the goods of an intestate, commonly called letters ad colligendum, belongeth to the Ordinarie, appeareth by this case: If an Ordinarie sequester the goods of an intestate to another man, and a third disturbeth, here the Ordinarie hath an action of trespass at the Common law, though the sequestration be a spirituall act, because he had possession: yet he cannot have an action of debt, albeit actions of debt in this case runne against him. But if the Ordinarie doe sequester the goods (ex officio, or for any contumacie) which giueth no possession to him, then the Spirituall court shall haue iurisdiction.

That divorces are of spirituall iurisdiction, is apparant by many books at the Common law, needlesse to be rehearsed: but where a prohibition



prohibition lay in Corbets case without consultation vpon a suit brought in the Spirituall court, to repeale a diuorce, and consequently to make the issue of the second wife bastards, (which may therefore seeme to make this point doubtfull) it was not for that the court ecclesiasticall might not holde plea of diuorces: but the prohibition lay, because the title and discent were comprised in the libell: and this was agreed to be the cause, by the court: and so it is reported by Brooke. And if a man giue goods in marriage with a woman vnto the husband, if they be afterward diuorced, it was holden, that the woman diuorced may well sue for those goods in court Christian. But if any further doubt should (herein) vpon the former case remaine: That statute which affirmeth, that diuorces by appellation were carried forth of this Realme vnto Rome, like as other causes Ecclesiasticall of testaments, of matrimonie, of right, of tithes, oblations, and alienations, and appointeth how delegates (vpon such appellations to be made) shall determine them all within the Realme, doth put all out of doubt. Likewise where it is affirmed by a farre elder statute, that Ordinaries are both to certifie and trie of bastardie and bigamie, which (for the most part) can not be done, without the conuifance of diuorces, whereupon the former (especially) doth depend.

Lastly, it remaineth to shew when and how goods and chattels promised with a woman in marriage (after the marriage accomplished) be demandable and determinable in the court Ecclesiasticall: for besides one or two cases afore rehearsed, where (by the way) so much is implied, it appeareth by many consonant iudgements in the verie point: For if a contract be made betweene two men, that if the one will take to wife the others daughter, then he will giue him ten pounds: In this case, if the money be to be demanded, it shall be demanded in the kings court: because he did not promise the money with his daughter in marriage, but by way of covenant, that he should marrie his daughter. But if he had promised the money with his daughter in marriage, then it should haue bene demanded in court Christian. Likewise in an action of debt, the plaintiffe declared that he had married the daughter of the defendant, and that he should haue twentie pounds in respect thereof: and by agreement of all the Iustices of the Common pleas, without any answer of the defendant, it was decreed that the plaintiffe should haue nothing vpon his writ, because it is determinable in a court Christian, and is of the same nature as the very marriage is. So dooth Brooke also collect out of the Register that for marriage money and pension, the suit lieth in the Spirituall court: and agreeable to the former distinction of Thorpe

4. H. 7. c. 12.  
1. fol. 117.  
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Fitzh. no. na. Fitzherbert also reporteth it in his *Nona natura breuium*. Bracton in  
br. tit. proh. fol. like maner affirmeth it, and yeeldeth a reason thereof: for he spea-  
king of Ecclesiasticall iurisdiction, saith thus: *Sic de rebus datis vel*  
Bracton lib. 5 *promissis ob causam matrimonij principaliter: & sic de rebus que accidunt*  
cap. 16. *matrimonio, ut si pecunia promissa fuerit ob causam matrimonij: quia e-*  
*iusdem iuris id est iurisdictionis esse debet accessorium, cuius est principale.*

Brooke tit. And albeit Brooke in his abridgement report, that the same was also  
iurisdic. didon. elsewhere holden by three, v. Chace, Townesend & Littleton: yet he  
17. E. 4. fol. 4. seemeth to doubt of it, and saith there is also great opinions against  
37. H. 6. fol. 9. it, because there is *quid pro quo*, and therefore likely to be determina-  
ble in a Temporall court.

Therefore it may probably be thought that these opinions in this  
45. E. 3. fol. 24. behalfe 37. H. 6. either were in such a case, as it grew to a lay cou-  
per Br. iur. 11 tract, such as Thorpe speaketh of in the booke of *Affises* (as is afore-  
alleged) else there was some couenant for the money by deed. For  
in an action of debt brought upon a couenant by deed, that if the plaintife  
should marrie the defendants daughter, the defendant should give him an  
hundred pounds, which condition of marriage the plaintife had performed:  
it was adiudged, that (notwithstanding *Articuli Cleri*) the matter did be-  
long to the Temporall court, because it was by deed: but it had not belon-  
ged to it, but to the court Ecclesiasticall, if it had bene without deed. By  
which iudgement, the case also in the booke of *Affises* seemeth that  
it ought thus to be vnderstood and limited: v. that albeit the con-  
tract were by way of this condition, if he should marrie, yet if it  
were without deed, it belonged to the court Ecclesiasticall.

## CHAP. 4.

General proofs out of statutes, that sundry other causes besides testamentary  
or matrimoniall, are of Ecclesiasticall conisance.

**B**Efore I proceed further to shew in particular, what  
matters besides, be of Ecclesiasticall conisance and  
iurisdiction, and how farre I holde it nothing amisse  
to shew (in some generality) first, that there are some  
other such, which be neither testamentary nor matri-  
moniall, nor yet any way depending, or of affinitie to  
them. The Great charter (to the obseruation and propugnation  
wherof, the king and the great nobles and officers were woont to be  
sworne) layeth this groundworke of all which followeth: *We haue*  
*granted to God, and by this our present Charter confirmed for vs and our*  
*heires for euermore, that the Church of England shalbe free, and shall haue*  
*all*

Mag. char.  
cap. 1.



all her whole rights and liberties inviolable. But that she had these rights and liberties then, (which are now claimed) the actes of Courts Ecclesiasticall in those and former times, and in all succeeding ages, (without prohibition or other oppugnation,) with the statutes and reportes, (some whereof were made not long after) and so from time to time downward (till these late challenges) doe make it very manifest.

It is provided by statute, that the Chancellor or chiefe Iustice of the King, upon sight of the libell whereupon any prohibition is brought (if the case cannot be redressed by any writ out of the Chancerie, but that the Spirituall Court ought to determine the matter) shall write to the Iudges (where the cause was first mooved) to proceede, the prohibition directed notwithstanding: So that whereinsoever by custome and liberties of holy Church, Iudges Ecclesiasticall were wont to proceede, if no writ lie thereupon in Chancerie, they may still holde plea, and take consueance.

24. Edw. 1. Stat. de consultati-  
one.

Also in the conclusion of the statute of *Articulis Cleri*, where sundry matters besides Testamentarie and Matrimoniall, are mentioned, it is thus enacted: that the Prelates, Clergie, and their successors shall use, execute, and practise for evermore, the iurisdiction of the Church, in the premisses, after the tenor of the answers aforesaid, without quarrell, inquieting, or vexation of our heires, or any of our Officers whatsoever they be.

Artic. Cleri. 9.  
Ed. 3. ca. 16.

Likewise it is by Parliament accorded, that the Ministers of holie Church, for money taken for redemption of corporall penance, nor for prooffe and account of Testaments, or for transaile taken about the same, nor for solemnitie of marriage, nor for other things touching the Iurisdiction of the Church, shall not be impeached nor arrested, nor driven to make answers before the Kings Iustices, nor other Ministers: and thereupon shall have writs in the Chancerie, when they will demand. Where we finde that other things besides Commutations, matters Testamentarie and Matrimoniall, doe belong to the iurisdiction of the Church.

15. Ed. 3. ca. 6.

And to like effect after in the same Kings daies: Commissions to enquire of Iudges of holie Church, whether they made iust procees or excessive, in causes Testamentarie and others, which notoriously pertained to the consueance of holie Church, were from thence forth forbidden. Therefore, these statutes being still in force, if Iudges Ecclesiasticall shall be found but to deale as they ought, in matters appertaining meerely to Iurisdiction Ecclesiasticall; howe the vexations, impeachments, drivings to answer, and enquires against them, used in some places, may be iustified

18. Edw. 3. pro  
Clero ca. 6.



stified by lawe, is worthe the consideration of those, that are or shall be procurers therein.

1. Ric. 2. ca. 3.

In a statute of king Richard the second, mention is made, that the pursuies for tythes, and for some other causes, of right ought and of olde times were wont to pertaine to the spirituall Court. In a statute of king

24. H. 8. ca. 12.  
in praeamb.

Henrie the 8. it is testified, that both the authorities and iurisdiccions spirituall and temporall, doe conioyne together in the due administration of Justice, the one to helpe the other: And that the lawes temporall are for triall of proprietie of landes, and goods, and for the conservation of the people of this Realme in unitie and peace, without ravin and spoile. And in the bodie of the statute are particularly named and reckoned for Ecclesiasticall, (besides causes Testamentarie and Matrimoniall.) these, viz. divorces, right of tythes, oblations, and obventions, of which it is affirmed, that the knowledge of these causes by the goodnes of Princes of this Realme, and by the lawes and customes of the same, appertaineth to the spirituall Iurisdiction of this Realme. And because by that

statute remedie was onely provided that appellations in those afore-

25. H. 8. ca. 19.

saide cases should not be prosecuted out of the Realme: (there being also many other causes of Iurisdiction Ecclesiasticall, wherein a like remedie was convenient to be had) therefore the next yeere after it was enacted, that all manner of appeales, of what nature or condition soever they be, or what cause or matter soever they concerne, shall be made and had by the parties grieved, &c. after such manner, as is limited for causes of appeales in matters Testamentarie, Matrimoniall, tythes &c. vt prius.

1. Edw. 6. ca. 2.

In a statute of king Edward the 6. (besides matters of voluntarie Iurisdiction Ecclesiasticall, as collations, presentations, institutions, inductions, letters of orders and dimissories) are reckoned in generall as Ecclesiasticall, all suites and causes of instance betwixt partie and partie, and all causes of correction: And in particular, all causes of bastardie, or bigamie, and inquirie De Iure patronatus: besides matters of Testa-

3. Eliz. ca. 23.

ment, of administration, or of accounts upon them. And in one statute in her Maiesties reigne, are reckoned in particular (as the more grievous sorte of matters of correction in Ecclesiasticall Courtes) heresie, refusing to have a child baptized, or to receive the holie Communion, or to come to divine service, error in matters of religion or doctrine nowe received, incontinencie, usurie, simonie, perurie in the Ecclesiasticall Court, and Idolatrie. And therefore Iudges Ecclesiasticall may lawfully cite men, in certein other causes, besides Testamentarie or Matrimoniall: and ought not (ex nomine tantum) to be vexed, inquieted,



sted, impeached, driven to answer, or arrested.

**C H A P. 5.** That suites for title of Benefices upon Voidance or Spoliation & likewise suites for tythes, Oblations, Mortuaries, &c. for Pensions, Procurations, &c. are of Ecclesiasticall Jurisdiction, is prooued by statutes.



Attors and suites for the title of benefices Ecclesiasticall (so they touch not the trial of the patronage) doe belong also to the knowledge and iurisdiction of a court ecclesiasticall, by the lawes of the realme. For conisance of voidance of benefices, and the discus-

25. Ed. 3. pro Clero ca. 8.

sing thereof, de iure do belong to Iudges of holy church, and not to the Lay Iudges. And by the bookes of the Common lawe, whether the Church be full or not full, or the Clerke able or not able, is tri-

M. 22. Edw. 4. fol 24.

able in an Ecclesiasticall Court. Tounesend. Likewise for spoliation of a benefice, a man is to be sued in Court Christian. But this lieth not, but where a Clerke is in as an incumbent: for if he be in as an usurper of the Church being full, or as a trespasser, there lieth action of trespassse, and not spoliation: But if two incumbents be in, and the one claimeth by one patrone, and the other by another, there lieth no spoliation: but where both claime to be in by one patrone, or by means of one patrone, then lieth action of spoliation, and not otherwise. For where the right of Adnonsion may come in question, there lieth no spoliation, for that cannot goe to a spirituall Court. And againe a litle after: Spoliation and debate upon an appropriation, shall be determined in the spirituall Court.

44. Edw. 3. 33.

38. H. 6. 19.

38. H. 6. 20.

But touching tythes where they are to be sued, it appeareth by Parliament thus. The plea for tythes shall passe in the Court Christian, as farre forth as it is derained in the kings Court. In the next kings daies, thus: In tythes, oblations, obventions, mortuaries, (sithence they are proposed vnder these names) the Kings prohibition shall holde no place. And againe, the Kings prohibition shall not lie for tythes of a Mill, nemely corrected.

13. Ed. 1. ca. 5. Westm. 2.

9. Ed. 2. ca. 1. Artic. Cleri. Ibidem cap. 5.

Likewise in the daies of Richard the second, it is thus contained in a statute: The Clergie complaine for that the people of holy Church pursuing in the spirituall Court for their tythes, and their other causes which of right ought, and of olde times were meant to pertaine to the spirituall Court, and that the Iudges of holy Church hauing conisance in such causes, and other persons thereof meddling (according to the lawe) be male-

1. Ric. 2. ca. 13.

tionally



23. H. 8. ca. 9.

tionously endited, &c. and by secular power oppressed, and be forced by other obligations and many undue meanes compelled to cease utterly against the liberties and franchises of holy Church: It is enacted that such obligations made by violence should be void: and the enditers of malice when the enditees be acquit, should incurre the paine of those that procure false appeales, &c. Likewise the preamble of a statute in king. H. the 8. dayes doeth argue, that matters of tythes are to be heard and determined by Iudges Ecclesiasticall.

24. H. 8. ca. 12.

27. H. 8. ca. 20.

Ibidem.

32. H. 8. ca. 7.

Ibidem.

1. Ed. 6. ca. 13.

34 &amp; 35. H. 8. ca. 19.

The same is also prooued by that, where in another statute it is saide thus: *Inconueniences haue arisen by reason of appeales out of the Realme to the See of Rome, in causes Testamentarie, causes of matrimo- me, and diuorces, right of tythes, oblations, and obuentions.* And in the pre- amble of another statute, *Detainers of tythes, pursuing such their dete- stable enormities and iniuries, haue attempted in late time past, to disobey, contemne and despise the processe, lawes, and decrees of the Ecclesiasticall Courtes of this Realme, in more temerous and large manner, then before this time hath bene seene.* And therefore it was then enacted, that for subtraction of tythes, offerings, and other duties of holy Church, the partie griued, may by due processe of the Kinges Ecclesiasticall lawes of the Church of England, conuent the person offending, before the Ordinarie, and also compell him to yeelde their saide duties. And likewise for any his contempt, disobedience, or other misdemeanor, upon complaint to any of the Counsell, or to two Iustices of the peace, to haue him committed, untill he shall be bound to giue due obedience to the processe, proceedings, decrees, and sentences of the Ecclesiasticall Court of this Realme. And afterward by another statute of the same king, it is enacted, that for denying to set out tythes, for deteining, withholding or refusing to pay tythes or offer- rings, Ordinaries may proceede according to the course and processe of the Ecclesiasticall lawes. And in the preamble thereof, it is directly affir- med, that by order of the Common lawes of this Realme, a man cannot haue any due remedie against detainers of tythes. And the like also ap- peareth by the statute of tythes, made in K. Edw. reigne.

That which is afore affirmed and determined, concerning tythes, oblations, obuentions, and Mortuaries, the like is to be saide of pensions, portions, corrodiess, procurations, indemnities, and other such duties Ec- clesiasticall. For it is enacted, that for these denied, Ecclesiasticall per- sons themselues, may make such processe against the person denying, or a- gainst the Church charged, as heretofore they haue lawfully done, and as by, and according to the lawes and statutes of the Realme, they lawfully may doe. And the person convicted, (according to the Ecclesiasticall lawes)



lawes) shall pay to the Plaintiff, the things recovered and his costes.

CHAP. 6.

That suites for right of tythes belong to the Ecclesiasticall Iurisdiction, and howe farre, is shewed out of the booke and reportes of the Common Lawe:

so of places of buriall and Churchyardes, and of

Pensions and Mortuaries.



THE reportes of iudgements and opinions of the Courtes at the Common Lawe (conteyned in the booke of termes and yeeres) called booke cases, are no lesse plaine and pregnant in this matter.

M.44.Edw.3.  
fol.32.

An attachment vpon a prohibitiō was sued against a plaintiff in a Court Ecclesiasticall, surmising that he did sue there for hay and money, which touched neither Matrimonie nor Testament: but vpon shewing the libell, which prooued it was for tythes and oblations, a consultation was granted, for the spirituall Court to proceede. And where the right of tythes is in question, it is triable in the Court spirituall. Likewise, so soone as it appeareth, that the right of tythes comes in debate, the Lay Court shall cease, and shall be out of iurisdiction: quod fuit concessum.

M.22.Ed.4.  
fol.24.& pas-  
sim alibi.  
38.H.6.fol.21.

The same is testified in the booke of Assises: For if the kings patentee of tythes renewing in a Forrest that is in no Parish (in which case the tythes doe belong to the king) haue cause to sue any, that ought to yeelde tythes, and ought to sener them from the nine parts, such suite shall goe to the spirituall Court.

22.Assis.fol.75

In the booke of Entrees in the precedent of a consultation granted, Prohibition, it is thus said: *In causis de decimis, de testamento, vel matrimonio, quando sub eo nomine proponuntur, prohibitioni Regia non est locus.* And so Bracton saith: *Non pertinet ad Indicem secularem cognoscere de ijs que sunt spiritualibus annexa, sicut de decimis & alijs Ecclesia pronentibus.* And againe afterward: *Mutatur quandoq; iurisdictione de iurisdictione in iurisdictionem, mutatis rerum nominibus, ut si de Laico catallo fiat spirituale (ut cum res fuerint decimate) sunt de Laico catallo res spirituales, & sic mutatur iurisdictione secularis in spiritualem.* And therefore where it is reported in the booke of Assises 38. pag. 20. that the Exchequer held plea in matter of tythes betwixt two parsons of Churches, because the one was the kings dettour, it is said, that neither of the benches would haue done it, and that it was a merwaile.

consultation.2  
Bracton lib. 5.  
cap.2.

Bracton lib. 5.  
ca.16.

Brooke tit. Iur.  
risd.9.

We are therefore to vnderstand, that neuerthelesse in some cases, the suite for tythes doeth not lie in an Ecclesiasticall Court: As for example, where it is otherwise determined by statute: For it is provided,

D

that



45. Edw. 3. ca.

Brooke tit.

Consultat. II.

Plowden.

Elizab. inter  
Soby & Mul-  
lins.

Ibidem.

that where a man is sued in a Court Ecclesiasticall for tythes of great trees aboue 20. yeeres growth, which may serue for timber of shippes or houses, the kings prohibition shall lie. Yet it was agreed in the Parliament at Sarum, that a consultation lieth for *Sylua cedua*, albeit it renewe not yeere by yeere. It was also adjudged in the case betwixt Soby and Mullins, that of hornebeames, Sallowes, and such like trees, (that are of so base nature that they serue not for building, nor are of any endurance, and seruing for fewell, and other meane uses) tythes should be paid, not onely of the trees themselves, but of their boughes when they are lopped, of what age sooner they be. But the opinion of the Court in this case then further also was, that if the tree it selfe by that statute (being but an affirmance of the Common lawe afore) be priuiledged for tythes, as Oke, Ashe, and such like, that the armes and boughs also of them (being of twentie yeeres growth or aboue) shall be free likewise. And the reason is added, for they may serue for some use in building. So that here it may be doubted, if trees aboue twentie yeeres growth, being of a kind priuiledged and timberable, as Oke, Ashe, Elme, &c. yet themselves being so litle, so crooked, or so rotten, as that they can serue for nothing but blocks and fewell, whether shall pay tythes, and be demandable in a Court Ecclesiasticall? For here the reason of that iudgement doeth cease, because they serue not for any vse in building.

T. II. H. 4. fol.  
242.

This doubt is also enforced by the opinion of *Askham*: who to mainteine the prohibition there brought (though the suite in the Ecclesiasticall Court were for great wood) was driuen to auerre, that they were such great trees as might serue to build an house sufficient for any mans dwelling, according to the custome of the Countrey. But this question is to be discussed by the reuerend and learned Iudges.

Tit. Prohibi-  
tion.

It seemeth also by the booke of *Entrees*, that a prohibition lieth, where tythes of corne and wood be sued for in an Ecclesiasticall Court, if an action of trespassse be thereupon depending afore at the Common law. Likewise

38. Ed. 3. fol. 8.

if a man couenant to pay or set out his tythes truly, he must be sued in a temporall Court upon this acte of couenant, and not else where. Furthermore, tythes of corne &c. may be considered either before they be seuered from the nine partes, in which case, if all the corne be caried away (it is saide) the suite lieth in a spirituall Court: Or after seuerance: and then to carry the tythe away after seuerance from the 9.

38. Ed. 3. 6.

50. Ed. 3. 10.

38. Ed. 3. 8.

parts, is said to be a trespassse determinable at the Common lawe. But I finde (to mine vnderstanding) great opinion against this: as first *Bracton*, where he saith: *Cum res fuerint decimate, sunt de laico cat-*

Bracton li. 5.  
ca. 16.



to res spirituales: For decimare must needs be to tythe and set out from the nine partes. Secundarily the opinion of the whole Court: *M. 12. Ed. 4. fol. 23.* For upon an action of trespassse brought by a person against the Vicar, the Vicar justified, that he tooke them for tythes being severed from the nine partes, and that he and his predecessors time out of minde, had prescribed them to be due: whereupon the Iudges (ex officio, without petition of either partie) dismissed this plea unto the spirituall Court, as not pertaining to their iurisdiction. *Solut Apollo.* But the statutes for tythes doe now stint this strife, and makes both cases to be Ecclesiasticall: *27. H. 8. ca. 20. 32. H. 8. ca. 7. 2. & 3. Ed. 6. ca. 13. 14. H. 4. 17.* Upon corne carried away, whereupon it comes to be tried between two persons of Churches, who hath right to the tythes, this triall belongeth to the spirituall Court, and is not upon action of trespassse to be brought to the Common Law. And so it was adiudged, albeit that the defendant there said that his parsonage was then in lease: But if they had ioyued issue, whether the place whence the sheaves were taken, were in the one Parson or the other, then it should have bene tried at the Common Law, because the bounds of a Parish shall be tried by the Countrey. *39. Ed. 3. 130. 18. 5. H. 5. 26. Brooke tit. Iurisdiction.*

If a parson grant to me by deede all the tythes of his benefice, and yet afterwards he sueth me in a Court Christian, for the tythes of mine owne lands, whereupon I bring mine action of covenant in the Temporall Court; neuerthelesse I shall not have a prohibition, because I may pleade that manner in band in the Ecclesiasticall Court. *Dauby & Chok. 13. M. 8. Ed. 4. fol. 13.*

But if a rent reserved upon a lease of tythes or offerings, be sued for in a spirituall Court, there lieth a prohibition, for this is a Lay rent: and so Bracton holdeth in the place before alledged, agreeable to the statute of *Articuli Cleri*. It is holden, that if a Patrone having an Indenture to be quit of certeyne tythes, be sued in a Court Christian for those tythes, he shall have a prohibition. But aske whether (this precedent of the Register notwithstanding) he may not have a consultation by the opinion of *Dauby and Chok*, afore recited: And the rather in this case then in the former, by how much it is more to be presumed a Symoniacall compact against him that is patrone: For if it be not Symoniacall, he may pleade this covenant in barre in a Court Ecclesiasticall, as well as in the former case. *Lib. 5. ca. 16. Register. fol. 38.*

The competencie of the Court for suite of tythes, dependeth also much vpon the consideration of the parties that contende for them. For in an action of trespassse brought at the Common Law, the defendant said that the corne, whereof the plaintife complained, was growing in D. which is parcell of A. where he is parson, and whereof he claimeth. And because in the pleydings, they were both named persons, the opinion of the



Hill. 7. H. 4. fol.  
35. per quof-  
dam libros &  
102. per alios.

35. 50. 8. H. 4.

35. 50. 8. H. 4.

6. Ed. 4. 3.

6. Ed. 4. 3.

Brooke tit. Lu-  
risdict. 822 H. 7

31. H. 6. 11.

1. H. 6. 5.

31. H. 6. 11.

1. H. 6. 5.

6. Ed. 4. 3.

6. Ed. 4. 3.

38. H. 6. 19.

25. H. 8. vt re-  
fert Brooke  
tit. Iurisdict.  
nu. 95.

Court was, that it was out of them iurisdiction. In another action of trespasse brought against a Laye man that claimed by lease from another parson (notwithstanding that by M. 44. Ed. 3. it was alledged that the Kinges Bench in such case shall haue iurisdiction, because it is betwixt a Laye man and a parson, and that by Articuli Cleri (by the contract) transeunt decima in catalla) yet because it was of tythes which they might recover in Court Christian, Galcoigne helde, that the Temporall Court ought to be out of iurisdiction: for (saide he) though it had bene so done afore, yet it shall not be done so by vs here. And of the same opinion was Moyle in another like action of trespasse: that, betwixt a Parson and a Farmer of another Parson, action for tythes lies in a spirituall Court, because the Farmer claimes the tythes as due to him selfe during his terme, which none gaine saied.

But vpon the former of these two last cases, Brooke doeth thus collect: that, it thereby appeareth cleerely, that vpon contention for tythes betwixt a parson and a Laye servant of another parson, the spirituall Court shall haue iurisdiction. For (sayth he) the seruant doeth claime to the use of his Maister, and not to his owne use, vpon any Laye contract. But howe this collection may stande, together with other iudgements else where reported to be given, may moue some doubt: For, in an action of trespasse brought by a parson against the seruant of another parson: the seruant iustified for tythes of his Maister, and thereupon demaunded iudgement, whether that Court woulde holde plea thereof, and it was not allowed, because the sayde defendant was a Laye man. Likewise, in an action of trespasse brought by a Vicar for corne, taken by the seruant of another parson, that claymed them as tythes of his Maister, and the plaintife claymed them as tythes due to his Vicarage: it was adiudged by three, that the Courts Temporall had Iurisdiction, because the Plaintife had none action against the seruant in a Court Spirituall.

It should seeme by the opinion of Markham, that if any part of right of tythes doe come in debate betwixt two Patrones, that there the Court Ecclesiasticall cannot hold plea. And if the Lord of a manor claime tythes of certeine lands in D. to finde a Chaplaine or Curate in D. therewith, and the Parishioners there claime those tythes likewise for the selfe same ende: It was deliuered for lawe, that the Laye Court should haue iurisdiction betwixt them, and not the spirituall Court.

There remaineth yet one thing that is due to the Minister, whereby also he hath a part of maintenance, that is demaundable and determinable in an Ecclesiasticall Court, viz. the place of buriall, and



and the Churchyard. Touching the first: A parson, to an assise brought against him, for a house, did plead that he was parson of P. and that to be parcell of his Church by time immemoriall, and that there had bene burying of dead bodies: whereupon Persey held opinion that the court Temporall ought not to take consufance thereof. For the second, it is a good plea against the iurisdiction of the Temporall court, to plead that the land is his Churchyard. Li. 44. ass. pa. 8. 44. E. 3. lib. ass.

The true reason hereof I take to be alleged by Bracton, because it is dedicated and consecrated to God, where thus he writeth: *Negotium terminabitur in foro seculari si de laico feodo agatur, nisi fuerit dedicatum & Deo sacratum: sic enim res efficitur sacra: hoc autem dici non potest de re in liberam & perpetuam elemosinam data.* For though a thing be giuen in Francke almoigne, to an Ecclesiasticall person, yet it remaineth of lay fee still, and is not said to be consecrate to God. Therefore a trespassse done upon a parsons glebe land (which is a francke tenement) can not be tried in a Spirituall court. But it seemeth that in a trespassse done in a churchyard, it is otherwise: for if a man take trees that are growing in a churchyard, the parson may sue for them in court Christian. 19. H. 6. 20. H. 17. H. 3. Fitz. referente tit. prohib. 26.

Likewise it appeareth by the course of the Common lawes, that pensions are demandable in courts Ecclesiasticall. For a mortuarie it appeareth a consultation was granted in the booke of Entries: and for right of a mortuarie, it is very manifest by diuers booke cases, that the suite thereof doth appertaine meere to an Ecclesiasticall court. Regist. fol. 46. & 48. referen. Bro. tit. prohib. Tit. prohib. M. 9. H. 4. M. 10. H. 4. 1.

CHAP. 7.

Of right to haue a Curate: and of contributions to reparations, and to other things required in Churches.

**N**OW when a parish or hamlet hath right to haue a Curate found in their chapell, to say them diuine seruice: If this be denied them, and no circumstance otherwise be incident thereto, to draw it to the Common law, it should seeme by all reason, of his owne nature to be a matter belonging to the consufance of a court Ecclesiasticall, accordingly as alwayes (without impeachment) it hath bene vsed. Yet I finde in the books of Common law, that an action of the case was maintainable for not saying diuine seruice, albeit it was there confessed to be a spirituall matter. What the circumstances and cause hereof was, that it was so ruled in that case, *Quere.*

But



Fitzh. no. na.  
br. tit. Consult.  
fol. 50.

Iniunctions  
published  
1559.

But that *parishioners* ought to be *contributories*, and may be cited in a cause of *contribution* towards the reparations of the bodie of the church (termed *Namis ecclesia*) and to the charges of buying and furnishing other *utenfiles*, ornaments, and books required by law to be bought of the common charge, doth appeare partly by the *Register*, and by *Fitzherbert* in his *Nona natura breuium*, who doeth gather it thence. For if (saith he) a bishop do cite any of the *parishioners* of a church to be *contributorie* to the reparations of the parish church, or of any chapell annexed to it: if the partie sue a prohibition directed to the bishop, surmising that he is impleaded (touching lay fee) in court Christian, the bishop shall haue a consultation vpon matter shewed in the Chancerie on his behalfe. And partly also by the Iniunctions which were set out by the Queenes Maiestie in the first yeere of her reigne, and are vnder the great seale of England for better record of the matter, her highnesse being thereunto authorised by act of parliament. For in these are contained sundry *utenfiles*, ornaments, books and other things that by the common cost of euey parish shalbe prouided, and from time to time supplied: and whether they be wanting or no, is to be inquired by Ecclesiasticall iudges, and the obseruation of the Iniunctions is by them to be vrged (against those, that shall infringe any of them) by processes and censures Ecclesiasticall, according to the course of that law.

### CHAP. 8.

Proofs in generall, that sundry crimes and offences are punishable by Ecclesiasticall iurisdiction: and namely, idolatrie, heresie, periuurie, or læsis fidei, and how farre the last of these is there to be corrected: also of disturbance of diuine seruice, or not frequenting of it, and neglect of the Sacraments.

Statut. Circumspectè agatis 13. E. 1.

1. H. 5, cap. 1.



Lastly do follow the testimonies of the lawes of the Realme for prooffe, that many crimes also and offences are punishable by iurisdiction Ecclesiasticall: and first in general, then in particular for sundry of them: The king writ thus to his Iudges: use your selues circumspectly in all matters concerning the bishop of Norwich and his Clergie not punishing them, if they holde plea in court Christian of such things as be meereley spirituall, that is to wit, of penance inioyned for mortall sinne &c. In hospitals that be of any others foundation then the kings, it is enacted that Ordinaries shall enquire of the foundation, erection and gouernance of them, and of all other matters necessary in that behalfe: and thereupon make thereof correction and reformation after the lawes



*Lawes of holy church as to them belongeth. In the statute of Citation it is permitted that a man may be cited out of the dioceses where he dwelleth, when some spirituall offence or cause is committed and done, or omitted, neglected, or foreflowed to be done by some having spirituall iurisdiction.* 23. H.8. cap.9.

In a statute of K. Edward the sixt, *Causes of correction be reckoned as Ecclesiasticall: which statute though it be repealed (for the principall purport thereof being touching Ordinaries seales and names not to be vsed any more in their citations and proceses) yet it bringeth sufficient evidence, that sundrie matters of correction be of Ecclesiasticall iurisdiction. And so Bracton testifieth that it was vsed and holden in his time: for he saith, In causis spiritualibus vel spiritualitati annexis, ut si pro peccato vel transgressione fuerit poenitentia iniungenda, iudex Ecclesiasticus habet cognitionem, quia non pertinet ad regem iniungere poenitentias, nec ad iudicem Secularem.* 1. Ed.6. cap.2. Bracton lib.3. cap.2.

But to descend to more particulars, and first concerning those which are contrary *Pietati in Deum*: that idolatrie is punishable by iurisdiction Ecclesiasticall, appeareth by the statute *De excommunicatione capiendo* afore alleged: and touching heresie, or error in matter of religion or doctrine (besides that statute) others do also shew how it is inquirable, and punishable by iurisdiction Ecclesiasticall. For both the preamble and statute of Henrie the fourth, and the statute of Henrie the fift touching heresies, do plainly testifie heereof. In the former whereof is said: that *the diocesans of the Realme cannot by their iurisdiction spirituall, without ayd of the royall Maiestie, sufficiently correct nor restraine the malice of heretikes, because they goe from diocesse to diocesse, and will not appeare before the diocesans, but contemne the keyes of the Church and censures of the same &c.* And in the later: that *the consufance of heresie, errors and lollardies belongeth to Iudges of holy church, and not to secular Iudges.* And likewise by a later statute, whereby it was provided that *euery person being presented or indicted of any heresie, or duely accus'd or detected thereof by two lawfull witnesses at the least to any Ordinaries &c. might by them be proceeded against &c. and none otherwise.* 2. H.4. cap.15. 2. H.5. cap.7. 25. H.8. cap.14.

Neither is it materiall, though the said three statutes do stand repealed, for they shew neuerthelesse touching heresie, what then was and now is still at the Common law: which offence to be still punishable at the Common law, doth more plainely appeare by the statute of Citations, being stil in force: for there it is provided that (the said statute notwithstanding) *the archbishop may cite and summon any person of his prouince for cause of heresie, if the immediate Ordinarie do consent,* 23. H.8. cap.9.



sent, or doe not his duetic : and that the prerogative of the archbishop of Canturbury shall not be preiudiced by that statute.

Circumspecte  
agatis.  
13. Ed. 1.

5. Eliz. cap. 13.

5. Eliz. cap. 9.

The like is testified of breach of an oath, and of periurie in an Ecclesiasticall court or matter : for after that (amongst diuers other matters) in the statute of *Circumspecte agatis* breach of an oath is mentioned, it is thus in the end added : *In all cases afore rehearsed, the spirituall Iudge shall haue power to take knowledge, notwithstanding the kings prohibition.* And by the aforesaid statute *De excommunicato capiendo* (among fundrie other crimes and offences) *Periurie in the Ecclesiasticall court*, is reckoned to be of Ecclesiasticall iurisdiction. And so is it by a prouiso in the statute against periurie made at the same time.

M. 2. H. 4. 15.  
Concordat  
24. H. 1. per  
Brooke pre-  
munire 16.  
doct. & stud.  
lib. 2. cap. 24.

But by bookes of the Common law, I finde two cases wherein breach of oath called *lesio fidei*, in an oath voluntarily taken, whether priuately, or before an Ecclesiasticall Iudge (as was in those dayes much vied) is to be determined in the Temporall, and not in the Ecclesiasticall court. The one is such as fell out in the case of the vicar of *Saltaſh*, who had made an obligation, and had bound it by an oath (that he would not go against it) before the popes collector in England, who pretended (as it seemeth, though vniustly) some iurisdiction Ecclesiasticall in himselfe : against which oath, when the vicar was supposed to deale, and was therefore conuented before the said collector, there went forth a prohibition, and no consultation could be obtained. For (said *Hankford*) *a man shall not be sued before an Ordinarie for periurie, but where the principall matter whereupon the periurie grew, was a matter spirituall or touching it* : And alleged this reason : *for else if the periurie should be found against him, he should be strait awarded there to performe the oath whereupon the periurie grew, and whereof he is attainted : and so though it were to pay debts, he should be there compelled to pay them, and hereby lay contracts should be determined there, contrary to the kings royaltie.*

Tit. H. 4. fo. 341  
secund. vnam  
impres. & 88.  
vel 85. secund.  
aliam.

P. 38. H. 6. 39.

Fitzh. tit. proh.  
12. ex Regist.

And againe the same man in the same kings dayes, afterward reporteth, that a man had sworne to make a feofment of his land, and because he did it not, he was vexed by the partie in the court Christian, as for the periurie : and because such suite shall be as a compulsion to performe a thing touching land and inheritance, it was adiudged in such manner, as if he had sued for the principall in court Christian. And the effect of both these cases is rehearsed (with the like reason) by *Fortescue* in the *Eschequer Chamber*, and was expressely graunted by some, and gaine-said by none. Therefore if a man and his wife do aliene the right of his wife, and the wife is sworne that she will not sue the *Cui in vita* : and yet after



after the death of her husband brings the writ, and the other sueth her in court Christian for breach of her oath, she shall have her prohibition.

Agreeable to which, is that iudgement long agoe, that if a man sue another in court Christian pro latione fidei, which oath arose upon a temporall contract or cause, a prohibition lieth. And Bracton that writ in that time: *In placito quod pertinet ad coronam & dignitatem regis, cessat fides fuerit appositae in contractu, non propter hoc pertinebit cognitio super principali ad iudicium Ecclesiasticum.* Heercof he allegeth a reason in the same booke, *Iurisdictionem regiam non mutat fidei interpositio, sacramentum praestitum, nec spontanea renuntiatio partium.*

M. 4. H. 3. referente Firz. prohib. 15. Bracton lib. 5. cap. 2. Idem lib. 5. cap. 9.

Agreeable to which resolutions, In an attachment upon a prohibition, where the plaintife was sued in court Christian pro latione fidei, in that he had sworne to pay fifteene pounds, and did not: Brian held, that when the faith is made touching a matter spirituall, then the breach thereof shall be punished in a court Spirituall: (as if one should sweare to pay me his tithes truely, or a woman to marrie with me) but if the faith be made upon a matter temporall, then the breach of faith shall not be punished there: because they will not assoile him (if he be conuict) till some temporall due tie be contented and payed.

M. 20. Ed. 4. fol. 10.

Another case where the Ecclesiasticall law shall not haue conu-  
sance of the breach of an oath voluntarily taken, is when there lieth an action for the matter (whereof the oath was confirmatorie) at the Common law: therefore it was holden by Brian not long after, that if a man sweare to pay twentie pounds, that he oweth, at a certeine time, and pay it not, and for the periurie be brought into the Spirituall court, there shall lie a prohibition: because (saith he) an action of debt lieth at the Common law.

T. 22. Ed. 4. fol. 10.

I make this a seuerall cause and reason from the former, because an oath may grow vpon a temporall matter, where none action lieth for it. As if I promise without any consideration to giue you twentie pounds, and binde it with a voluntary oath, it seemeth the Common law will holde it still but *pro nudo pacto*: and yet in all these cases of breach of a voluntarie oath, it seemeth that (by law) the Iudge Ecclesiasticall may deale, so he obserue these two things following. The first is, that he enioyne not, nor by any meanes compell the partie that did sweare, to performe that temporall matter, whereunto the oath tied him, but onely enioyne him corporall penance. For it was adiudged, that if a man demand a debt of tenne pounds before the Ordinarie, for that he plight his faith to pay it &c. and hath not payed it, but broken his faith, the Ordinarie can not enioyne him to pay the debt for

Lib. 22. Assis. fol. 70.



Fitzh. titulo  
prohib. nu. 2.

34. H. 6. 70. re-  
ferente Brook.  
iurisdic. 2.

M. 20. Ed. 4.  
fol. 10.

T. 12. H. 7.  
fol. 22.

1. Mar. cap. 3.

1. Eliz. cap. 2.

sauegard of his faith: and if he do, he doth it against the kings prohibition: but he ought to enioyne him other corporall penance, except the partie will willingly redeeme it &c. For so Fitzherbert readeth the last wordes, more truely then the booke it selfe of *Assises*, which as it is printed, carrieth no sence in those wordes of exception: therefore that case where it was holden, that if a man buy a horssse of me, and sweare upon the *Euangelists* to pay me ten pounds for him such a day, and pay it not, I shall haue an action of debt at the Common law, and also a citation pro latione fidei, at the Spirituall law, and shall not therein offend the Common law, because they are diuers things: for auoyding of contrarietie (as Brooke also there enclineth) must needs accordingly be vnderstood, *viz.* That the court Ecclesiasticall may onely punish the perurie, but not exact of him either directly or indirectly to keepe his bargaine. The second caution which (it seemeth) the Ecclesiasticall iudge is herein to obserue, least he offend the lawes of the realme, is, that he proceed not at the suite of a party, but onely *ex officio*. For in the case of 20. Ed. 4. (a little afore in this chapter alleged) Brian and Littleton held (none gainsayng of it) that in latione fidei arising upon a temporall matter (as in another like case there mentioned, and to be touched hereafter) the Spirituall court might punish it *ex officio*, but not otherwise, as at the suite of the partie. To like purpose Mordant holdeth, that if a man be sued in a court Ecclesiasticall, by a partie pro latione fidei, in not paying a summe of money promised, there shall lie a prohibition: but if the iudge Ecclesiasticall shall doe it *ex officio*, then no prohibition shall lie. Which opinion no man there impugneth or denieth.

That disturbance of diuine service is also punishable by iurisdiction Ecclesiasticall, the statute thereof made in the time of *Queene Mary*, doth prooue: for though it do prouide punishment temporall therefore, yet it reserueth the iurisdiction that Ordinaries had for punishment thereof by lawes Ecclesiasticall. Not to frequent or come to diuine seruice at times appointed, is declared to be subiect to proceeding and censures Ecclesiasticall, as well as to other punishments, by the statute for Vniformitie of Common prayer: and so is both that and neglect of the Sacraments, by the statute *De excommunicato capiendo*, heretofore often alleged, prooued to be of Ecclesiasticall conuenance. And thus much touching offences Ecclesiasticall, referred especially to impiety towards God,



CHAP. 9.

That simonie, vsurie, defamation or slander, beating of a clerke, sacrilege, braunting or fighting in church or churchyard, dilapidations, or waste of an Ecclesiasticall living, and all incontinencie, are punishable by Ecclesiasticall authority, and how farre.



Mongst such crimes as be offences against iustice, I doe place simony first, as participating also not a little with the former sort, yet rightly sorted hither: because it is as a buying and selling of such things, as be not (in truth) *res mancipi* (as the olde Romanes spake) thinges lying not in commerce betweene them to be bought and solde. This fault the said statute *De excommunicato capiendo*, sheweth to be punishable by iurisdiction Ecclesiasticall.

*Ibidem in fine.*

That vsurie is likewise, it doth appeare by authoritie of diuers parliaments. The king and his heires shall haue the conuissance of the vsurers dead, and the Ordinaries of holy church shall haue the conuissance of vsurers on liue, as to them apperteineth to make compulsion by the censures of holy church for the sinne, and to make restitution of the vsuries taken, against the lawes of holy church.

15.E.3.cap.5.

By another latter act made against vsurie, there are reserved to the spirituall iurisdiction, their lawfull punishments in every cause of vsurie. And so is it expressely also mentioned in the afore named statute *De excommunicato capiendo*: but this iurisdiction is since somewhat restrained, because vsurie can not now thereby be punished nor corrected, except it reach aboute the rate of tenne in the hundred by yeere.

11.H.7.ca.8.

13.Eliz.cap.8.

For causes of defamation, it is recorded by an olde statute, that it is already granted, that it shall be tried in a Spirituall court. And againe: In defamation, prelates shall correct by penance corporall, the kings prohibition notwithstanding: but if the offender will redeeme the penance with money, the prelate may freely receiue the money, though the kings prohibition be shewed.

Stat.circumsp.  
agast. 13.Ed.1.  
Artic.cleri 9.  
Ed.2.cap.4.

By the preamble also of the statute for citations, it is plainly argued, that defamations belong to the conuissance of iurisdiction Ecclesiasticall, so they be duely and according to law prosecuted. Also by the books of Common law it appeareth throughout the arguments made in the great case of prohibition, in the time of Henry the seventh, that the suite for defamation belongeth to Ecclesiasticall iurisdiction: for there, as well by those Sergeants that stood against the consulta-

23.H.8.cap.9.

T.12.H.7.  
fol.22.



tion, as the others, and the Iudges also that granted the consultation (the originall cause being *defamation*) it is granted that the punishment of slander or *defamation* is belonging to the Spirituall law.

M.2. H.4.  
fol. 15.

In a case afore alleged, vpon other occasion (principally concerning a prohibition brought against the deane of Windlor, that sued the vicar of Saltash in a Spirituall court *pro fidei latione*, made to confirme an obligation) Hankford then arguing, that the periwie could not there be sued, for that it ariseth vpon a temporall cause, affirmeth that he had a matter vpon the like reason ruled for him, and against the archbishop of Canturburie, H. 14. Edw. 3. *Par attachment sur prohibition &c. de ceo qu'il fust en court Christian par defamation*. So is the booke at large, v. 2. the suite spoken of by Hankford, was by way of a writ of attachment vpon a prohibition first brought: the cause was, for that the Archbishop sued him in an Ecclesiasticall court for *defamation*: which can not be simplie & generalie vnderstood of euery *defamation* whatsoeuer (as Brooke seemeth to take it) for then could it not be like to *lesio fidei*, which he speaketh of, neither could fit the purpose of his argument, because it must be such a cause, as in his owne nature is otherwise Ecclesiasticall, but arising (as that *lesio fidei* did) vpon a temporall matter, therefore may not be sued by the party, in a court Ecclesiasticall.

Brooke titulo  
consultation 2  
& alibi.

1. E. 3. cap. 11.  
Concordat.  
regist. fol. 42.

This interpretation is confirmed both by statute law, and reports of the Common law. It is enacted that a prohibition lieth, if a man be sued for *defamation* for endicting a man: where note, that the statute nameth no court where the *defamation* is sued, as being sufficiently described by the wordes *defamation* and *prohibition* to be Ecclesiasticall, had it not arisen of a cause temporall. Another cause why *defamation* sometimes may not be sued in an Ecclesiasticall court, is when

R. 18. E. 4. fol. 6.

there lieth action at the Common law: as where a man brought action of trespassse for goods taken away, the defendant hereupon sued him in a Spirituall court for *defamation*, and Hussey the kings attorney in behalf of the plaintife desired a prohibition, because the plea in court Christian was mooued, the suite hanging there, and had it granted: quod nota. So if I be robbed, and speake of him that robbed me before others, so that he sueth me in a Spirituall court for *defamation*, there lieth a prohibition; because I may haue an action at the Common law, v. 2. mine appeal of the robbery. In like case we finde precedents of prohibitions granted against those that prosecuted in an Ecclesiasticall court (*in causis defamationis*) such persons as sued them in Temporall courts for maimes, and for forging of euidences.

Booke of En-  
trics ut prob.



If a man lay violent hands on a Priest, this offence is punishable also by Ecclesiasticall Iudges. Therefore it was determined in another Parliament, that for excommunication pro violenta manuum iniectio-  
ne in Clericum, before a Prelate, where penance corporal is enjoined: if the defendant will redeem his penance by giving money to the Prelate or partie grieved, it shall be required before the Prelate, and the Kings prohibition shall not lie. This seemeth to haue bene there determinable (by some reportes at the Common lawe) euen afore these statutes. For if a man enter into S. Johns place, and beate the brethren there, and take their chattels, for this violence he shall be sued in Court Christian, and so it was adjudged by the Court.

Stat. circumf. agatis. 13. Ed.

I. Art. Cleri. 9.

Ed. 2. ca. 3.

H. 7 H. 3. referente Fitzh. tit. Prohibition on nu. 30.

But I finde two cases where laying violent hands on a Clerke, shall not be sued in a Court Ecclesiasticall, but there will lie a prohibition. The first is, If a Clerke be arrested at the Common lawe, if thereupon he sue in a spirituall Court pro violenta manuum iniectio in Clericum, there lieth Prohibition. Another case is, when a man is excommunicate for laying violent hands on a Clerke, if the spirituall Court deny absolution till amends be made to the partie for the batterie, a prohibition also will be granted: because it shall be entended, he which sueth, doeth it to recover damages.

Register fol. 42. &amp; 51.

T. 11. H. 4. fol. 241. in alijs libris vel 88. vel 85.

But (though it be at the suite of the partie) if onely the punishment of the offence, and not any amends be sued for, it is determinable in a Court Ecclesiasticall, albeit the Temporal Court haue also the debating of the matter, touching the amends and the batterie. 6.

Art. Cleri. 3. &amp;

Ibidem.

For (saith Thirning) if he sue onely to enforme the Court that the other hath laid violent hands upon him being a Clerke, to the intent the sentence of holy Church may goe against him to bee excommunicate for the wrong done to holy Church, and not to recover damages, peradventure it might be tollerable. To which another booke agreeth, that if a man beate a Clerke, and he sue him in the spirituall Court for his sinne of excommunication, he doeth well: but if he sue to haue the matter there examined, and for amends, there lieth a prohibition. And we finde a precedent of a consultation graunted, euen where a partie sued in Court Christian, pro violenta manuum iniectio in Clericum: yet it is founde, that not onely the partie may thus sue to haue him punished, but the spirituall Court may also punish it ex officio, as Brian and Littleton there did holde.

H. 22. Ed. 4. fol.

Entrees. sit. Prohibition.

M. 20. Ed. 4. 10.

Touching Sacrilege, that it is also punishable by lawe in a Court Ecclesiasticall, two adiudged cases may be alledged out of Fitzherberts great Abridgement. For if a man take goods out of the Church or Churchyard,

M. 4. H. 3. per Fitz. Prohib. nu. 14.



H.17.H.3.  
per Fitzh.tit.  
Prohib.nu.26.  
5.& 6.Ed.6.  
ca.4.

Churchyard, hee that hath propertie may sue him in a Court Christian, and may compel him to stand to the sentence & iudgement of the spiritual court for this offence. And againe: If a man take trees that are growing in the churchyard, the parson may sue for the in court Chr. & for the sacrilege also.

Concerning fighting, quarrelling, and brawling in Church or Churchyard, the Ordinarie in some degree is to punish it by suspension *ab ingressu Ecclesie* in a Laye man, and from ministration in his office in a Clerke, and in an other degree in either sort Lay or Ecclesiasticall, by denouncing the partie offending to be excommunicate *ipso facto*, by vertue of that statute.

13.Eliz.ca.10.

Dilapidations likewise and waste made vpon a liuing Ecclesiasticall, are determinable and punishable by Ordinaries. For the statute made in her Maiesties time for remedie in Dilapidations prouideth, that as afore by the lawes Ecclesiasticall, iust actions and remedies might be had against executors and administrat. of deceased incumbents: so they should by vertue thereof be vsed against alienees and donees of the goods of such incumbents. So at the Common law, *Tirwhit* did holde, that if an Ecclesiasticall person make waste of his benefice, he shall be deposed, as a Dilapidator of his Church. But deposition cannot be inflicted, but by authoritie Ecclesiasticall.

M.2.H.4.fol.9.

H.6.H.3. per  
Fitzh.tit. Pro-  
hibit.nu.16.

I finde in *Fitzh.* this case reported: an attachment vpon a Prohibition was brought, because he sued him for debt in a Court Christian: the defendant said he sued him for taking of his goods, &c. because the plaintife is a Clerke not hauing any Lay fee, &c. and for that the plaintife did acknowledge this and the writte was, that hee sued him for debt; it was awarded, that the plaintife should goe cleare. But whether either of these causes might seuerally serue, or only both together for ground of this iudgement, quere.

Stat.Circum-  
specte agatis.  
13.Edw.1.

Those crimes which I saide were opposite to sobrietie in a mans owne selfe, are also punishable by Ecclesiasticall authoritie. For the Clergie are not to be punished for holding plea in Court Christian, of such things as be meereley spirituall, that is to wit, of penance enioyned for deadly sinne, as fornication, adulterie, and such like. In which wordes of (such like) I doubt not but other incontinencies, as Incest, Stuprum, and Polygamy be also vnderstood, being all more grieuous then fornication, and two of them more execrable then adultery. And to make it more plaine, that all vnlawful company of man and woman, not being capitall by the lawes of the Realme, is subiect to the Iurisdiction Ecclesiasticall, the generall worde of *Incontinencie* (which comprehendeth all) is vsed in the statute *De excommunicato capiendo*.

5.Eliz.ca.23.



## CHAP. 10.

*This the crimes hitherto not spoken vnto, and here reckoned, be also of Ecclesiasticall Iurisdiction to punish: and proves that any subjects, Laye, or other, may be cited, in any cause Ecclesiasticall.*



Here doe yet remaine some fewe points laid foorth in the generall distribution of matters concerning *Iurisdiction litigious*, and claimed to be Ecclesiasticall, which are not particularly touched or spoken vnto, because I doe not call to minde, nor hitherto finde by turning of my fewe bookes, that they are expressly mentioned in the lawes or statutes of the realme, to belong either to the one, or the other iurisdiction: which omission is an inducement for me to presume, (seeing from time to time as occasions haue fallen foorth, they haue bene handled in Courts Ecclesiasticall) that therefore they haue bene without any contradiction yeelded to be Ecclesiasticall, so that none haue made doubt, nor brought them into controuersie or argument, in Temporall Courts. Such be partly some duties Ecclesiasticall, as *fees in Courts Ecclesiasticall, Curates or Clerkes wages*, and a right of some Towne or Hamlet to haue a *Chapleine* found to serue them: and partly they be crimes, as *Blasphemie, Swearing, Schisme, Apostasie from Christianitie, Subornation of perjury* in a Court or matter Ecclesiasticall, *Sollicitation of a womans chastitie, drunkennes and filthy talking*: Albeit all these be comprehended in the generall words of Iurisdiction Ecclesiasticall, mentioned 1. *Eliz.*

1. *Eliz. ca. 13.*

Now seeing the first sort of these are matters whereunto subjects haue a right, and the second are grievous crimes in a Christian Common weale, meete by punishment to be corrected in the offenders, and suppressed: and yet be such as cannot (to mine vnderstanding) be redressed by any writ out of the Chancerie, which reason is the ground in statute for granting consultations, and of leauing matters to be determined by the Spirituall Court: it will therefore followe, that they are of Iurisdiction Ecclesiasticall. But those of them that be crimes being (no doubt) great and deadly sinnes before God, may wel come within the general words of the statute *Circumspecte agatis*, where deadly sinne is mentioned, and for an example is brought *adulterie, &c.* with this generall enlargement, and *such like*, to belong vnto the punishment Ecclesiasticall. Yet besides the want of a writ out of the Chancerie to redresse a matter, I finde something further (by good opinion) to be required, ere the Iurisdiction Ecclesiasticall can be perfectly grounded. For it is holden, that a prohibition lieth, not onely where a man is sued in the Spirituall Court for such thinges, which

Statutum de Consultatione. 1. *nc. 24. Ed. 1.*

Ibidem.

Doff. & 1. *dent. lib. 2. ca. 24.*



a man may haue remedie for in the Kings Court: but also where the spirituall Court holdeth plea, where by the ancient custome of the Realm, they ought not to holde, as vpon a simple or bare contract of the testator, there lieth none action at the Common law against the executors, & yet he may not be sued for it in a spirituall Court. But this will be none hinderance in any of these last recited points, considering that by continuall custome (without any impeachment) they haue bene dealt in by Iurisdiction Ecclesiastical, as may appeare by the records of those Courts.

I haue hitherto toode vpon the matters wherein Ordinaries by lawe may holde plea: to shewe thereby, that they may cite in other causes then Testamentarie or Matrimoniall: for deale in them, or handle them they could not, vnlesse the partie which is pretended to offer the wrong, or to be the offender, might be conuented, which is by citation. Therefore (besides the authorities here and there in the former discourse falling in by other occasions, which might sufficiently prooue that they may cite and compell men to come before them) I will now briefly vse some further direct prooffe to conuince, that in other causes then those two, men may be cited before Iudges Ecclesiasticall.

Artic. Cleri. 9.  
Ed. 1. ca. 12.

23. H. 8. ca. 9.

Ibidem.

Ibidem.

32. H. 8. ca. 7.

1. Ed. 6. ca. 2.

It appeareth by *Articuli Cleri*, that for any matter ecclesiastical indefinitely, men might bee cited. For vpon doubt mooued, whether the kingstenants were subiect thereto, in such sort as others are: it is decreed, that *such as holde of the kings tenure, may be cited before their Ordinaries, and may be excommunicate for their manifest contumacie, and after 40 daies, may be attached by the kings writ as others.* The preamble of the statute made of purpose for them, proueth Citations euen of men, wiues, seruants, and other the kings subiects for diffamations & tithes (so they be vpon iust matter, and in due order) to be lawful. The body of that statute prouideth, that *no citation be made out of the Diocesse &c. where the partie dwelleth, but where some spirituall Offence or Cause is committed or done, &c.* so that a *contrario sensu* in any other offence or cause spirituall (as very many are afore prooued to be) any subiect may be cited within his or her Diocesse, and in those also there excepted, may be cited out of the Diocesse.

Likewise for Heresie, the Archbishop of Canturbury may cite any of his Prouince, if the immediate Ordinarie doe consent, or doe not his dutie. In a statute made fortyethes, *any man withholding them, shall be conuented according to the Ecclesiasticall lawes.* And there is also mentioned *Compulsorie processe & censures of the Church.* In a statute of k. Ed. 6. though for the bodie thereof it be repealed, yet thereby is testified, that *sum-*

mons



more and citations the proceſſe Ecclesiasticall in all ſuits and cauſes of inſtance betwixt party and party, and in all cauſes of correction.

Therefore ſeeing there is no colour, that onely ecclesiasticall perſons ſhall fall out to bee detainers of ſuch duties ecclesiasticall, or that they onely will proue offenders in the crimes afore redited, neither can all the kings tenants, nor yet men, wives, ſervants and other ſubjects be intended (for the moſt part) to be other then lay perſons. we may ſafely conclude, that not onely in cauſes Teſtamentarie or Matrimoniall, but in very many other afore noted, any ſubject whoſoever, may be cited before his Ordinarie, or other competent Iudge. *Quod erat probandum*, as being the very contradictorie of the opinion that we are in handling.

CHAP. III.

Of a Prohibition, what it is, where it lieth not, and where it doth: and how it ceaſeth by a Conſultation: and of the writ of Inducement.



When any Court goeth beyond his bounds, and dealeth in other matter or ſort then the lawes of the land will warrant, there lieth in ſome caſes writs at the common lawe which are of *Prohibition* or *Inducement*: and in other caſes a writte brought in by ſtatute, called *Promiſion* or *Premunire*: and the *Prohibition* and *Premunire* doe lye as well againſt temporall, as againſt ecclesiasticall Courtes. The *Prohibition* is a charge by the kings writ, to forbear to hold Plea either in ſome matter or maner, which it is ſuppoſed a man dealeth in, beyond his iuriſdiction. Every *Prohibition* is either *Prohibitio iuris* by the very lawe it ſelfe, or *Prohibitio hominis* where the miniſterie of the competent Iudges in that behalfe, is vſed. any Statute prohibitory is *Prohibitio Iuris*, a very prohibition in it ſelfe, and therefore it is a contempt to ſue againſt it.

In a prohibition we are to conſider, In what matter it lieth not, at what time it lieth not, where and when it lieth, and how it ceaſeth or looſeth his force. For the firſt, it is provided by ſtatute, and the king thereto determineth thus, that no prohibition ſhall goe out of the Chancery, but in ſuch caſe where we have the Conſentance, and of right ought to have, and therefore Thurning ſaith, when we ſee the iuriſdiction belongeth not to us, we will graunt a conſultation, ſo that if the matter be more ecclesiasticall, there lieth no *Prohibition*.

Touching the ſecond poyn, it ſeemeth a *Prohibition* is not to be graunted, till by ſight of the Libell there appeare cauſe to graunt it.



31. H. 6. fol. 14. For Henke sheweth, that by the Statute de Regis Prohibitionibus & de con-  
iunctim seoffatis in fine, a man shal not haue prohibitiō, antequam le sit con-  
suetum in curia spirituali: which is till a libell be put in, and the party put to  
answere it: and this is to be certified to the Chawnceller, by the viewe of the  
Libell: which Fortescue graunted.

M. 4. E. 4.  
fol. 37.

Brooke tit.  
prohib. nu. 17.

T. 12. H. 7.  
fol. 22.

M. 2. H. 4.  
fol. 15.

Stat. de con-  
suetud. 24. Ed. 1.

Lib. 2. cap. 24.

Artic. Cleri.  
9. Ed. 2. cap. 6.

T. 9. H. 3. per  
Fitzh. Prohib.

But this poynt hath two exceptions: one is, when the copie of the  
Libell (contrary to the Statute 2. H. 5.) is denied: for vpon this cause,  
I finde a Prohibition graunted, that the Ordinarie should surcease, till the  
copie of the Libell according to that statute were deliuered: another ex-  
ception is in some court, where a surmise is made that the suite (in  
trueth) is for some other matters, then are exprest in the Libell: for  
Brooke reporteth that a man may haue a Prohibition in the Kings Bench  
vpon such a surmise (as for example by surmising the suit to be in deede for  
great timber, though it be demanded in the Libell vnder the name of Sylua  
cedua) but he saith it is otherwise in the common Pleas.

Touching the third poynt, for what causes a prohibitiō is granted:  
I find it may be granted either in respect of some of the parties to the  
suite, or in regard of the Iudge before who it is, or for the matter han-  
dled. For the first of these: If a Parson of a Church do sue another Par-  
sons former or seruant for right of tithes, being not such as can trie the  
rights of tithes: Fineux held that a prohibition may be graunted. Hereof  
see further in the sixth chapter afore. Touching the second, it may bee  
graunted either for the Iudges contempt, as in not deliuering copie  
of the Libell, as is afore touched: or for that he hath not indeede any  
iurisdiction, for so it was iudged by Hankeford and by the whole  
Court, as it seemeth in the vicar of Saltash his case being contented  
before the Popes Collectour. though a Consultation did otherwise lie, the  
Court will not graunt it to one, that hath no iurisdiction in right.  
Concerning the third and last poynt of the three, if the matter be  
temporall, that is such, as there lieth redresse for, by some writte in the  
Chancerie, then there lieth a prohibition, as seemeth by statute: to which  
agreeth the place before alledged out of the booke of Doctor & Stu-  
dens: yet this hath also two exceptions: one is, whereas the spiritual  
Court holdeth Plea quite to another end: for when one and the selfe  
some case is debated before Iudges spiritual and temporall (as for bounding  
of a Clarke) there the statute is, that notwithstanding the spiritual iudge-  
ment, the kings Court also shall debate it. For both these confluences ren-  
ding the one to the amends, the other to the excommunication, may  
stand together, as is shewed in the 8. Chapter.

The second exception hereof seemeth to be, when one Clarke sueth  
another



another in the spirituall Court for the goods of his house, for there lies no prohibition: as when one Abbot sueth another. secondarily a prohibition lieth, where a matter being at first ecclesiasticall, brings at last in debate a matter temporall matter with it, to be determined. therefore it was holden, that so sooke as it appeareth, that the right of tithes comes in debate, the lay Court shall cease, and bee out of iurisdiction: and the same law is of the spirituall court: for if it may appeare, that the right of action for may come in debate, although it appeared not at first, the spirituall court must cease: quod fuit concessu. This may happen (as for example) when suite is brought at first for right of tithes, & it falls out by depositions or otherwise, that the tithes demanded amount to the 4. part of the benefice by yeere, in which case it is determined that the temporall court shall have consise, even as if the right of Patronage were in demand principally. Doctor & Thirdly, a prohibition lieth for such a cause, as albeit there lie none action for it in a temporal Court, yet the matter is such, as of custome neuer belonged to an ecclesiast. court. as if an ecclesiast. court would hold Plea against an executor, vpo a bare contract made by his testator: for neither y court may heare it, nor there lieth actio for it in a temporal. Fourthly, there lieth Prohibition, when the suite tendeth to determine and giue execution in a temporall matter, as money &c. being due otherwise then by the iudgement given in the Court ecclesiasticall. therefore if a composition by indenture be made by an Ordinarie betwixt two ecclesiasticall persons, that the one shall have tithes, the other an annuities, with penaltie for default of payment: the suite for this shalbe as the common law: but the suite for any thing that riseth vpon a iudgement given in the spirituall Court, shalbe there, per Hill. for though amends be to be made by a certaine summe of money, this is no necessary cause to grant a Prohibition: no more then when the suite is for tithes, yet the condemnation in money, being the value of them: nor when a penance is redeemed by the party for money, which may be sued for in a spirituall court, per Butler. because when an offense is done to a man, it is reason that he haue amends for it: but there can be no more proper amends then money, because every thing may be valued by money, per Keble. Which they speake to proue, that amends in money may bee awarded in an Ecclesiasticall Court for Diffamation: and so the iudgement then passed, vpon this ground among others, as Brooke testifieth. and there is a great diversity betwixt a datie or summe of money or other things at the first demandable and determinable at the common law, and such a summe as before sentence given in the spirituall law, is due at all. for the first there lieth a Prohibition, but not for the second: for otherwise, it would follow, that the spirituall law

38.H.6. fol. 11.

T. 2. Ed. 4. fol. 20.

Circumspect. agatis. 13. Edw. primo.

Doctor &

Student.

Loco. d.

20. Ed. 3. cap. 2.

11.H.4. fol. 85.

T. 12. H. 7. fol. 22.

ibidem.

Brooke Confutation. nu. 5. T. 12. H. 7. fol. 22.



might give a iudgement which it could not put in execution. but this were absurd, per Reece & Tremaine.

T:22.Ed 4.  
fol.20.

Fiftly, it is saide there lies a Prohibition, when the party sued hath an action giuen him at the common lawe, for the original and principall matter, whereupon the suite at the eccles. lawe did growe. The case was thus: a man reported that the Abbot of S. Albanes did detaine his wife in the saide Abbots lodging against her will, to the intent to make her his barlot: the Abbot hereupon brought his action of Diffamation in the court ecclesiasticall, and the husband his prohibition. none because the husband might haue his action of false imprisonment at the common lawe against the Abbot, Brian held that a Consultation was not to be granted. *de hoc quære.*

Stat. de Con-  
sultat. 24. Ed. 1

A Prohibition ceaseth and looseth his force, after a Consultation be once granted. This may be proued by the statute *De Consultat.* for the Chancellor or chiefe Iusticer of the king upon sight of the Libell &c. if they can see no redres by writ &c. shal write to the spiritual iudges &c. to proceed, notwithstanding the kings prohibition directed to them before. But more

30. Ed. 3. cap. 4.

plainely after: Where a consultation is once duly granted, the Iudge may proceede in the cause, notwithstanding any other prohibition thereupon to him to be deliuered: so the matter in the Libell be not changed. The writ

Fitzh. Natur.  
breuium. tit.  
Prohibition.  
fol. 45.

of *Iudicium* is likewise a kinde of Prohibition, and lieth especially and naturally for a suite of tithes which doe amount to a fourth part or aboue of the benefice. It lieth also for the Patrone, where his Clarke is impleaded for the aduouson (id est) the right of Patronage, in a spirituall Court, the Patrone and Clarke that is sued in the court ecclesiasticall may sue it forth both against the ecclesiasticall Iudge and the party that sueth there. But it lieth not till the Libell be brought to be viewed into the Chancery, & his etiam contestata, and it lieth only before sentence be given in the court ecclesiasticall, for it is afterward voyd.

34. Ed. primi.  
de coniunctum  
feoffat.  
Fitzh. ibidem.  
Register.  
fol. 47.

## CHAP. 12.

An Analysis or unfolding of the two speciall statutes touching *Præmunire*, with sundry questions and doubts about that matter, requiring more graue resolution.



In the matter of *Præmunire* (which is a question falling often in doubt about execution of Ecclesiasticall iurisdiction, wherein as in the matter of prohibition and consultation you desired earnestly that I would write vnto you what I thought) I cannot in any point satisfie my selfe, much lesse you, by reason that



that this matter is enwrapped in ouer many difficult doubts, for me to vnfold. yet I haue some thing considred of it, & do trust y I shalbe able to point out vnto you certain general heds, wherunto most of the doubts, comonly made or hapning, may not vnfitly perhaps be referred: that thereby *tanquam Thesei filo* you may be directed (as opportunity shal serue) what & how in this behalf to enquire of the reuerend Iudges, or of other great learned and graue men of that profession.

There be two statutes, whereupon it is principally grounded. The first is of *Prouisors*, established in the time of king Ed. the third, the complaint and grieve there propounded was, that the kings people were drawen out of the Realme, to answere vnto things, whereof the Conisance pertained to the kings Court: and that iudgements there giuen were impeached in another court. The mischiefes then noted thereupon were, the preiudice & disherison of the king and of his crowne, and of all the people of the Realme: and the vndoing and destruction of the common law of the Realme. The remedy there giuen for these mischieues was: that if any of what condition soeuer (being of the kings liegeance) should drawe any out of the realme in plea, whereof the Conisance pertained to the kings court, or of things, whereof iudgements be giuen in the kings court, or which doe sue in another court to defeat or impeache the iudgements giuen in the kings court, should haue day &c. as is there more largely by the sanction contriued.

27. Ed. 3. cap.  
1. de Prouisor

The other statute is, of the time of King Richard the second: there is shewed and layd forth, that the Conisance of plee of *Presentments* to *Benefices*, belongeth onely to the kings court by the old right of his crowne: and that *Archbishops*, *Bishops*, and other spirituall persons, hauing the instituting vnto such *Benefices* (within their iurisdictions) be bound, and haue made execution of such iudgements, by kings commandements, without interruption: and that also they be bound of right, to make execution of many other of the kings commaundements: but it is there complained, that processe and censures of excommunication vpon certaine Bishops of England, were made by the Bishop of Rome, because the sayde Bishops haue made execution of such commandements: and that he purposed to translate some Prelates out of the realme, and some from one Bishopricke to another within the realme, without the Kings knowledge, and without their assent that so should be translated. There are assigned also for mischiefes hereupon growing: the open disherison of the crowne, the destruction of the king, of his lane and realme, and that these things are against the kings crowne and Regaly, that they defeat and destroy the statutes, that they tend to make the realme submitted to the Bishop of Rome, and the lawes

16. R. 2. cap. 5.

2. 10. 4. b. 1. 2.



and statutes of it by him to be defeated and destroyed at his will, that they drawe out of the realme (against the kings will) the sayd Prelats his liege persons of his counsell, that be much profitable and necessarie to the King, and to all his realme, and that these deuices will beare away the treasure of the realme: for remedie whereof it is provided, what shall not be done: viz. that none shall purchase or pursue, or doe to be purchased or pursued: where? in the court of Rome or elsewhere: what? any such translations, processe, and sentences of excommunications, bulls, instruments, or any other things: of what sort? which touch the king, against him, his crowne and his Regaly, or his realme: in what maner touching these? as is aforesaide. and likewise, that none shall bring them into the realme: or being perhaps brought in by another, shall receiue them: or being neither brought in by them, nor yet receiued from others, but coming (some way) to their knowledge, shall not make any notification, or any other execution of them: where? neither within the realme nor without &c. vpon paines there at large contained.

Of those generall heads, whereunto I said afore, that all questions of *Premunire* might be referred, there be some that being expressed in these statutes, are (I thinke) without all doubt, to be within the compasse thereof. as by the first of these two, to drawe any of the *Queens* liegeance out of the realme in a plea, whereof the consufance pertaineth, or iudgements be giuen in the kings court. And that which is sayd of a *Plea* in the kings court, is also drawn by some opinion, vnto a court Ecclesiasticall. For *Fetberton* in the *Kings bench* helde opinion oftentimes, that if a *Clerke* doe sue another in the court of Rome for a spiritual matter, whereof he may haue remedie within the realme, that he is in case of *Premunire*, quia trahit in placitum extra regnum. And *Fitzherbert* holdeth, that for collation of a *Prebend* sued out of the realme, a prohibition doth lie. *Noua nat. br. fol. 44. h.* Secondly it is an vndoubted *Premunire* by that statute to sue in another court, to defeat or impeache the iudgements giuen in the kings court. In these words of (Another court) there seemeth to be an opposition and feuerance of such a court, from the *Kings court*: the rather, because both the Preamble and the body of the statute do mention, drawing men out of the realme in *Plea*. whereof at that time there was no colour any man to be drawen any whither but onely to the court of the Bishop of Rome, whether he resided there, at *Anignon* in *France*, (where the Popes about that time did lie 70. yeres together) at *Bonony*, or elsewhere soeuer. Therefore for the true vnderstanding of those words enquire: If any of this realme of late yeres (whiles the parliament of *Paris*

9. Ed. 4. fol. 3.

was



was established by the authoritie of the French king vpon colour, that the Queenes Maiestie is in very right Queene of France, should haue brought processe thence against another subject to appeare there: whether this had not bene a *Premunire* by that statute? likewise, If any of the Queenes courts (not authorised thereunto by law vpon writ of error) should defeate a iudgement giuen in any other of the Queenes courts: enquire, whether this be within the meaning of those wordes, notwithstanding the *ambiguities* and distinction, whereby such *Another court* seemeth to bee seuered and made a distinct thing from the Queenes courts?

Thirdly it is an vndoubted *Premunire* according to the later of the foresaid two statutes: *to purchase or pursue, or to procure so to be done, in the court of Rome or else-where, any such translations &c. or any other things, which touch the King, be against him, his Crowne and Regaly, or his Realme, as is (there) aforesayd: or &c.* as is there further contained. *Fitzherbert* reporteth, that the opinion of the court was (*Pascha 11. Fitzh. tit. Premunire nu. 5.*) that *Alibi* in the sayde statute was understood of Bishops courts: so that if a man sue there, for a thing that belongeth to the common lawe, he shalbe in the *Premunire*. Therefore was it holden by some, that a benefice *Donative* by the *Patrone* is a meere lay thing, and the Bishop shall not visite it, and therefore shall not deprive from it, and if hee meddle in this case, it is a *Premunire*: and saith that *Barlow Bishop of Bath* for depriving the *Deane* that had it as a *Donative* by the kings letters *Patents*, was driuen to sue a *Pardon*. So *Fineux* chiefe Iustice saith, *15. H. 7. fol. 9.* *virtuall man may execute temporall iurisdiction, as the Bishop of Durham doth in his county Palantine, (viz. as he hath iura regalia, but not as a Bishop) and (saith he) the Bishop shall punish his Clerkes by Premunire for suing in spirituall courts for a cause temporall.* But whether that Bishop hath this authoritie (seeing *Premunire* is by statute) there is a *quære inde* made, as of a matter doubtful.

It was also holden, that a *Prohibition* doth often lie, where a *Premunire* doth not: as of tithes of great trees &c. for the nature of the action doth belong to the spirituall court, albeit not that very cause in that forme, but when it is of a lay matter, or of a thing that neuer did belong vnto the court spirituall, herein there lyeth a *Premunire*. But these notwithstanding, sundry doubts are made in this behalfe; because at this day all iurisdiction Ecclesiasticall is now truly acknowledged, and is in deede (as it was alwayes in lawe) in the soueraigne Prince, and from her prerogative royal deriued downe to others, no lesse then the *Admirall court* is, or the court of the *Countable* of Englande in times



past was, when it was vsed: albeit they vsed their peculiar scales, and names to the processe, there spedde. And I haue heard very credibly that some reuerend and great learned iudges (whiles they liued) were of opinion, that for an Ecclesiasticall Iudge to deale in a matter appertaining in very truth to a temporall court, yet for some neerenes and coherence by him probably supposed to be an Ecclesiasticall cause, could not at this day, be a *Premunire*, but subiect onely to a *Prohibition*, and punishable as a contempt, as it was at the common lawe vpon an attachement for *Prohibition*. For it is alledged that (*Alibi*) in the statute was put in to enclude processe deriued from the Popes authoritie, albeit he kept his abode any where els then at *Rome*, and that it cannot nowe signifie Bishoppes and their courts, which are called the *Queenes Ecclesiasticall courts and Iudges*, and the *Canons* by law established, the *Queenes Ecclesiasticall lawes*: inso-much as the power giuen by statute to her Maiestie, by her letters Patentes to name such as shall execute all maner of iurisdiccions touching or concerning any spirituall or Ecclesiasticall power, is brought to prone the sufficient ordinary authoritie, that Bishops haue giuen vnto them, by the very letters Patentes directed from her Highnesse for their confirming and consecrating.

1. El. cap. 1.

8. El. cap. 1.

It is further alledged, that this toucheth not the King, is not against him, his crowne and Regaly, or Realme, as not falling into any of the mischiefes, whereof that statute was meant to bee a remedie. And for that (all iurisdiction Ecclesiasticall being now in fact and Lawe vnited to the Crowne and from thence deriued) if it should be sayde that the handling of a matter but in an incompetent court (yet established by the Queenes authoritie) were in that high degree of offence and punishment against her Crowne: some thinke it reacheth thus farre, as to imply an incompatibility betwixt the crowne & ecclesiasticall iurisdiction, and by implication to denie her iust Royall prerogatiue ouer all perions, and in all causes as well Ecclesiasticall as Temporall, as if these could not both flowe from the Crowne, nor stande together and meete in one person, which is most erroneous to thinke.

It is likewise alledged, that this were to make in effect a *Premunire* to lie in euery case, where a *Prohibition* may, and alwayes hath serued the turne: for a *Premunire* seemeth to be as a remedie provided, where a *Prohibition* could not serue, to stay the course of proceeding: and that euen before the supremacy was acknowledged to the Crowne, no *Premunire* vpon this poynt onely is reported in the bookes.



bookes of vertues and peeres to hate bene inflicted: but onely for pursuing pleas of the conuſance of the K. Court out of the Realme, ſeeeking to defeate iudgements there giuen, and procuring Buls from the Court of Rome, in derogation of the lawes of the Realme.

Moreouer, it is to this purpoſe alledged, that by the ſtatute authoriſing 3. 2. perſons to ſet downe lawes Eccleſiaſtical, though repealed, it was provided, (as they thinke) in affirmance of the lawe, that no man for executing any of them, ſhould haue incurred contempt, paine, forfeiture, loſſe, nor haue bene in danger of any action or ſute of Premunire. Yet if ſuch lawes had bene framed, the Iudges Eccleſ. might (by miſtaking) haue giuen ſome cauſe of Prohibition. Therefore it is gathered by like equitie to be very hard, that an Eccleſ. Iudge meaning to doe his dutie, and but to execute Eccleſ. Iuriſdiction Eccleſiaſtical, yet by ſimilitude and neere coherence of one matter with another, miſtaking and ſo exceeding his authoritie, (a thing very eaſie in the Common law, wherein ſometimes doe happen varietie of iudgements, amongſt the oldeſt profeſſors of it) if before any Prohibition brought (as it were to forewarne him) he ſhould hereupon be drawne into a Premunire. For by like reaſon, if a court Baron ſhould heare plea of a matter about 40. s. a Premunire in ſteede of a Prohibition might be brought againſt them. Therefore enquire, and ſeeke to enforme your ſelfe in the premiſſes, and of theſe queſtions following, what is to be holden for law: viz. in holding plea in an Eccleſ. court of a Temporal matter, whether there be not a difference, when it is propounded vnder the very name of a Temporal action, and when it is propounded vnder the name of an Eccleſ. matter? and whether the Iudge be in danger before the matter be opened vnto him, or no? For I thinke in no Court Temporal or Eccleſ. the Iudges peruſe the writs, declarations, &c. when they are firſt put in. And whether it be as great an offence in lawe but to hold plea, as to giue iudgement, and to awarde execution in an Eccleſ. Court of a Temporal matter? alſo whether it be like degree of offence for an Eccleſ. Iudge to execute a Temporal matter by cenſures Eccleſiaſtical, as it is to execute it, or a matter Eccleſ. by Temporal, viz. fine, imprisonment, loſſe of limme, or ſuch like? Likewise of what qualitie the offence is to goe on in plea in a Court Eccleſ. after a meere Temporal matter (as right of Adowſon, &c.) fallies in controuerſie, principally to be determined? or to holde plea there in a matter worthe of redreſſe, yet neuer of cuſtome handled either in Temporal or Eccleſ. Court, nor whereof any remedie lies at the Common lawe? And what offence it is to make lawes

3. & 4. Edw. 6.  
cap. 11.



Temporall or Eccles. without the Princes assent? What it is to deale in Temporall causes or Courts, without Commission? and what in Eccles. And lastly of what degree and qualitie of offence is it, for a Court Temporall to hold plea of a meere Ecclesiasticall cause? or to deale in censures Eccles. or for such a Court to hold plea of a Temporall matter, being no competent Iudges thereof? As for example, if the Court of Common Pleas, or the Exchequer should deale in Pleas of the Crowne? with such like a great number of things.

## CHAP. 13.

That Laymen may be cited to take oaths in other causes then Testamentary or Matrimoniall.



THE third opinion now followeth, which is: that by the lawes of the Realme, no Lay man ought to be summoned or cited to make (or take, as I thinke is meant) an oath, in any other cause then Testamentary or Matrimoniall. This differeth from the former in two points. The first is in the partie to be cited: For the second opinion was, that none whatsoever, including both Ecclesiasticall and Laye: whereas this is onely, that no Laye man may be cited, &c. The second difference is in the ende of the citation: For here is said: a Laye man may not be cited to take an oath in any other cause: thereby leauing (as it might seeme) the Ordinarie at large, to urge persons Ecclesiasticall to take an oath in other causes also. But all comes to one ende. For if neither Laye nor Ecclesiasticall (as the second opinion holdeth) may be cited in any other cause: then cannot Ecclesiasticall men be cited in any other cause to take an oath. That which cannot be done at all, cannot be done for any ende, *non enim nulla sunt qualitates*. so that both these runnes to one point, sauing that hereby is affirmed, a citation may not be made to the intent a man shall take an oath, sauing in those two cases.

Nowe if this citing be meant of the partie defendant, then doeth it not impugne any proceeding Ecclesiasticall in vse, for the partie conuicted, is not cited *ad subeundum iuramentum*, but *ad respondendum tali in causa decimarum, &c. & faciendum iuramentum quod iuris fuerit & rationis*. If it be meant of witnesses, neither are they cited (against their will) not so much as in Testamentary or Matrimoniall causes, or any other to appeare, till faith be made by the partie, or by some other for him, that they take them to be necessarie witnesses for to testifie in that cause, and that being required, and their reasonable



nable charges offered them, they doe nevertheless without cause, refuse to come, and to testifie a truth. For then goeth a citation called *Compulsories* for them, *sub poena iuris* to come and depose their knowledges in such a matter, betwixt such parties. So that the citation is not *ad subeundum iuramentum*, albeit when they come they are not to set downe any deposition, but vpon oath: because it is *iuris diuini, naturalis, & gentium, quod non credatur testimoniis aia*. Also the Authour of this opinion should haue done well, to haue signified whether a Laye man being comethither without citation, might be vrged to take an oath. Therefore if the Authours hereof will hereby mainteine any controuersie against Courts Ecclesiasticall; the issue must be, either that to make the Defendant put in his answer vpon his oath, (so farre forth as he by lawe is bound) or to make witnesses testifie vpon their oath, is a thing contrarie to the lawes of the Realme.

But it appeareth by discourse vpon the former opinion, in howe many sundry causes of *litigious Iurisdiction*, (besides *Testamentarie* and *Matrimoniall*) Ordinaries may holde Plea (by the lawes of this Realme) according to the course of the Queenes Ecclesiasticall lawes. That the Ecclesiasticall lawes doe require this course (with the cautions aforesaide,) I thinke no man that knowes any thing in that lawe, will make doubt. A Plea is a conflict in cause of iudgement, betwixt one that affirmeth, and another that denieth. There be but two waies (besides the parties confession, which is not properly called a prooue) to prooue any thing: that is by witnesses, or by a publike instrument, called by the Common lawe, *matter of Record*. Nowe if witnesses might not be vrged to testifie vpon oath in any causes but *Testamentarie* or *Matrimoniall*; then could no Plea be holden in any other cause, when the chiefe & most vsuall meanes of prooue is taken away.

This libertie and priuiledge of holding Plea in the causes afore shewed, and in this manner as is nowe claimed, by the goodnes of *Princes of this Realme*, and by the lawes and customes of the same (as a statute rehearseth) appertaineth to the *Spiritual Iurisdiction* of this Realme, and hath bene in all succeeding ages vsed in Courtes Ecclesiasticall without impeachment, as by the recordes thereof may appeare. And therefore vpon any singular conceite newly taken vp by some priuate persons, it is not safe to bee thus questioned and opugned. There is an olde statute in force (as I take it) that may greatly bridle such newe quirkes, except men were maruelous well



15. Ed. 3. ca. 3.

well assured of the groundes of so great and so generall an innovation. For it is enacted, that great Officers about the King, and in his Courts of Justice shall from tyme to tyme forward, be sworne when they shall be put in office, to keepe and mainteine the priuiledges and franchises of holie Church, &c.

Art. Cleri 9.  
Ed. 3. ca. 12.

Ibidem.

But to descende to more particulers: the Kings tenants may be cited before their Ordinaries as others. Therefore both they and others (though Laye persons) may be cited in all causes of that Iurisdiction: neither is it there distinguished, whether they come in as witnesses, or as parties. Also they may as others be excommunicated, for their manifest contumacie. There are two sortes of contumacies noted in the Ciuill and Ecclesiasticall lawes: *presumptia*, a contumacie entended, as if a man being cited will not appeare, it is presumed to be done of contumacie, yet it may be otherwise, as vpon iust cause of let. Another is *vera* or *manifesta contumacia*, spoken of in this place. This (after apparance) groweth onely vpon peremptorie refusall to performe some decree or commandement of the Iudge, as in refusing to be sworne, or to be examined being sworne. Seeing then for manifest contumacie the Kings tenants or others may bee excommunicated, and this is indefinitely sette downe: it will followe, that as in any other non performance of the decrees of the Iudge (according to the Ecclesiasticall lawes) so in refusall to bee sworne, whether hee bee partie principall or witnesse, there is manifest contumacie. *Ubi lex non distinguit, nec nos distinguere debemus.*

17. H. 8.

Ibidem.

Particularly in matter of tythes (beeing neyther a cause Testamentarie nor Matrimoniall) the contemners of the processe, lawes and decrees of the Ecclesiasticall Courts of this Realme, are by statute condemned: but an vrging to answer or testifie vpon oath, is a decree of an Ecclesiasticall Court, ergo, may not bee condemned. The Ordinarie in a suite of tythes for any contempt, contumacie, disobedience, or other misdemeanours vpon complaint, may haue the party committed till hee shall bee bounde to giue due obedience to the processe, &c. decrees and sentences of the Ecclesiasticall Court of the Realme: but requiring a parties or a witnesses oath, is such a decree. Therefore, &c.

32. H. 8. cap. 7.

Likewise by another statute, the Ordinarie may conuent for withholding tythes according to the lawes Ecclesiasticall: therefore he may conuent and cite a man Lay or other (if he be supposed to be a withhold) to answer vpon his oath. For so is the Ecclesiasticall lawe.

Further,



Further, by that statute, the Ordinary may proceed to hearing and determination &c. according to the course and processe of the Ecclesiasticall lawes: but the processe and course of hearing by that law, is by the parties personall answer vpon oath, if it be required; and by compulsories of witnesses to depose by oath, as is afore touched. Therefore &c.

The statute of king Edward (touching tithes) provideth, that both they and the costs, charges, and expences in the suite shall be recovered before the Ecclesiasticall iudge, according to the kings Ecclesiasticall lawes: but for recovery of them, those lawes require (in cases aforesaid) both oath of party and of witnesses: Ergo. By that statute it is established, that the Ordinary for personall tithes may call the party afore him, and by his discretion examine him by all lawfull and reasonable meanes, other then the parties owne corporall oath, concerning the true payment of such personall tithes. Ergo a corporall oath is a lawfull and reasonable meanes: for, exceptions are alwayes of the nature of the rule, and should be within the rule if they were not excepted, and therefore also in all other tithes as prediall and mixt, it is a lawfull & reasonable meanes to put the party vnto his oath, *quia exceptio format regulam in casibus non exceptis.*

The statute for Vniformity of Common prayer authoriseth Ecclesiasticall iudges to enquire, to take accusations, and informations, and to punish the breaches of that act &c. in like forme as before had bene used in like cases by the Queenes ecclesiasticall lawes: but in like cases (by those lawes) oathes both of parties and witnesses haue bene vsually taken. Therefore &c.

A lay man being in prison vpon the writ *De excommunic. capiendo*, and not able to giue pledge or finde sureties, shalbe vrged to a caution iuratory, *secundum formam iuris*, that is to sweare *de preenda mandatis ecclesie*, or els to lie still in prison: for where a man can not put in a reall caution or *fidei iussory* with surety, there the law is, he shall take that oath. Therefore it is sayd after, in the writ, *Accepta cautione pignoratitia ad minus*, at least taking a pledge or reall caution. Therefore, &c.

One only instance destroyes a generall assertion; therefore if there were but any one instance to the contrary, an oath by law may be vrged of some lay man in some other cause then testamentary or matrimoniall: which being true, and the very contradictory of the opinion that is in issue (vpon this point) betwixt vs, it must needs follow that the opinion is vntrue, and therefore not grounded vpon law. *Quod probandum nobis proponebatur.*



## CHAP. 14

The grounds of the two next former opinions examined and confuted.

**H**He ground of these two opinions last handled (for any thing that I could ever learne) doth only rest vpon a precedent of a writ of *Prohibition*. In treating whereof (for that I shall be forced to gainsay something that is deliuered by graue, learned, and wise personages) I must first protest before God in sincerity of heart, that I do it not *calumniandi, sed veritatis studio*, whereof I am something resolutely perswaded in this behalfe. I doe reuerence & esteeme them all that are contrary perswaded, being men of great learning: neither contemning nor condemning any, so much as my selfe, as being most priuy to mine owne wants, and therefore (I trust) something taught to measure my selfe by mine owne foot. *Sed amicus Plato, amicus Socrates, magis amica veritas.* The copy of this writ I finde reported and set downe in two seuerall books. In the *Register* (contrary to the vse of other precedents there set downe) is deliuered but a parcell (as seemeth) of a writ in two or three lines, in these words, *vz. Quod non permittas quod aliqui laici ad citationem talis episcopi aliquo loco conueniant de cetero ad aliquas recognitiones faciendas vel sacramenta prestanda, nisi in causis matrimonialibus & testamentarijs.*

Register tit.  
prohib.

Abr. Rastall  
tit. prohib. &  
consult. nu. 6.

But the precedent of attachment there framed vpon this writ, runneth generally, without excepting these two causes, euen as if a lay man, whether party or witnesse, might not be vrged to take an oath except he lust, in any cause ecclesiasticall at all. In the *Abridgement of statutes gathered by Rastall*, I do finde a precedent of a *prohibition* set downe at large, whereof those words rehearsed in the *Register* (though something altered) be a parcell: in that point it is thus: *Rex episcopo Norw. Salutem &c. Mandauimus etiam vicecomiti nostro committat. Norf. & Suff. &c. quod non permittant quod aliqui laici in Ballina sua, in aliquibus locis conueniant, ad aliquas recognitiones per sacramenta sua faciendas, nisi in causis matrimonialibus & testamentarijs.* Whereby these three varieties do appeare betweene this and the former. First that which is said here by rehearsall, that the king had sent such a writ to the shirife, seemeth in the *Register* to be set downe as part of the copy of the writ it selfe, directed to him.

Secondly, that which is here *recognitiones facere per Sacramentum*, is there with the disiunctiue, *vz. ad aliquas recognitiones faciendas, vel*  
Sakra-



*Sacramenta praestanda.* Thirdly, in the *Register* is added, *ad citationem talis episcopi*. That writ which *Rastall* setteth downe at large (whence soever he had it) seemeth to be the perfect copy of the originall, and therefore of more credit. It is also probable, that the gatherer of the *Register* did abridge out of this writ at large, as he thought good: because in the very writs that went forth, the copies whereof be in the *Register*, letters (for the most part) be put there in stead of the names of the parties mentioned: whereas here it is *ad citationem talis episcopi*, without the name or any letter for it, that might direct men to know of what writ this was a parcell; which argueth that it was not *verbatim* copied forth of the writ. Howsoever it be, the one of them must expound the other, seeing they concerne one and the selfe same matters.

In treating hereof, I minde first to shew, that albeit these words did carry the sence that is inforced; yet it may be, that the law is otherwise then that they are not of that acception: and lastly that they are otherwise meant, and what is that true meaning. For the first, it is no law of necessity, being neither statute nor common law. No statute: for it is not in the *Parliament rolles*, nor in any printed booke of statutes at large, nor in sundry ancient written copies. It is no common law: for it is said to be *formata prohibitio super articulis cleri* (which is a statute of late time in comparison) and is contrary to the generall custome of the realme. For by time immemoriall, all Ecclesiasticall courts (without impeachment) haue cited both the parties principall for answer, and witnesses, to depose euen by oath, in all the other seuerall causes also, that are prooued afore to be of ecclesiasticall iurisdiction and conusance. The being of it in the *Register*, doth not make it of necessity to be law; for sundry of those writs were framed of late times (as may appere to any that will peruse them) vpon particular mens suites (as occasions fell foorth) and sometimes perhaps drawn vpon priuate suggestions of the counsell of one side, though afterward allowed. Beside, it is no new or strange thing to haue some forme of a writ set downe in the *Register*, to be vpon better aduise disallowed.

I haue credibly heard, that it was not long since adjudged, that in action of trespassse done in a warren of conies a man might not plead that they were *cuniculi sui*, albeit the *Register* in that behalfe frameth the writ so: and in the selfe same title (whence this forme of prohibition is taken) a clause in a prohibition was rejected by the court: for it is said in the margin, *Curia noluit concedere istam clausulam in prohibitionibus*.

one:.

Regist. pag. 37.



No. n. a. br.  
fol. 37. G.

Fitzh. ibid.  
fol. 269. D.

2. H. 4. cap. 15.

Fitzh. no. n. a.  
br. fol. 30. F.

one: but if it were law assured, the iudges would not haue reiected it. *Fitzherbert* (who in his booke of Nature of writs was the first that sucked this conceit thence) in the selfe same booke, of a rule set downe in the *Register*, vz. *notandum est, quod quando rex presentat ut in iure corone, tunc incurrit et tempus*: but saith he, *Now this rule is not holden for law*. But it will be said, that *Fitzherbert* himselfe, and sundry that follow him since, do holde this point we speake of for law. This no doubt carrieth a great presumption with it, and that woorthily, for the worth of the learning and iudgements of such men: yet I will shew that his saying is none vndoubted rule of law; and therefore theirs neither that do gather from him. I protest before God I will not seeke after obiections against his booke, but take only such two (in stead of moe) which I had in my minde, because they doe touch ecclesiasticall matters. He saith that at the *Common law*, an heretike must be conuicted of heresy, before the *Archbishop*, and the whole clergie of the prouince, and after abiured thereupon, and after that of fresh conuicted and condemned by the clergie of that prouince: and this must be in their generall councell of conuocation: and holdeth there, that at the *Common law*, a bishop in his diocesse might not condemne an heretike, untill 2. H. 4. did giue him authority: and that then he might not be committed to the secular power to be burnt, untill he had once abiured, and was againe relapsed into that, or some other heresie. But neither of these points be law; and so I haue heard the two chiefe Iustices, the *L. chiefe Baron*, and some other Iudges, and the *Queenes* learned councell, resolve. For albeit the Conuocation may condemne an heretike, yet euery bishop at the *Common law* (before any statute) might and at this day may also in his owne diocesse so condemne, as the preamble of that very statute makes manifest: and so by them was it then holden for law.

Likewise he saith it appeareth, that before the statute made pro clero in the 18. of king *Edw. 3. cap. 7.* the right of tithes were determinable in the *Temporall court of the king*, and that the law was altered at that time herein, by that statute. Whereas in very truth there appeareth no such matter, other then a griuance offered in this behalfe to the liberty of the Church, which then was determined that it should afterward cease.

That at the *Common law* tithes were demandable in a court Ecclesiasticall before this, may appeare by statutes afore that time, and reports after, testifying that the conuifance of right of tithes (at the *Common law*) is incident to iurisdiction Ecclesiasticall, as in the peculiar



peculiar treatise thereof is afore shewed. Lastly, (to shut up this first point) a precedent of a *Prohibition* of all other writs that can be devised, may with least reason be sayd necessarily to report what is law: for that *Prohibitions* are so often reuerfed and disanulled againe by *Consultations*, as might haue happened in this matter, for any thing that can be certaynely knowen, as well as in any other such like.

For the seconde poynt, that *Recognitionem facere* simply and absolutely can not signifie the answere vnto the Libell of the partie conuicted, nor the deposition of witnesses, may appeare: because this fourme of *Prohibition* is sayde to bee *formata super Articulis Cleri*. But out of them no such matter can (with any colour) bee gathered, and therefore being taken in such sense, must needs bee a glose besides his text. Againe, I finde in the fourme of a writte, where *Sacramentorecognoscere*, so being ioyned together, doeth signifie a testification by oath: but where *Recognitionem facere* (without further addition) shoulde signifie a parties answere, or witnesses deposition, I doe not call to minde that I haue read in any so much as pretending to write Latine.

Fitzh. nou. na.  
breu. fol. 31.

Howsoeuer it might be shewed in other, surely in this place (for auoyding many absurdities) it cannot so signifie: for the Register reades it, that the Sheriffe shall not permit laye men to come together in any place, *ad recognitiones faciendas, vel Sacramenta praestanda*, but in those two causes. So that by the distinctiue (*Vel*) whatsoeuer *Recognitionem facere* be, neither that may be done, nor an oth in any other cause may be taken by any lay man whatsoeuer, though otherwise he were willing. For the word *Laici* is indefinite, not restrayned to any one sort of lay men: and so that which is here forbiddē, is simply forbidden to all lay persons, and in all other causes, whether they be parties or witnesses, willing or vnwilling, with othe or without oath. And then doeth this interpretation sort to this poynt, that in no cause (besides those two) any lay person may by Lawe, though hee would come to answere or testifie, with an othe or without an othe in a court Ecclesiasticall. But this is absurd and vnreasonable to imagine, and therefore that must needs be also absurd, whereupon it necessarily followeth. For *omne verum vero consentaneum*: and, by the rule of all reason wee knowe, *Ex veris possunt nil nisi vera sequi*.

Nowe for prooffe that it is absurde and contrary to Lawe, thus I proceede: No plea can bee holden, but where there is one that affirmeth, and another that denieth that which is affirmed: and then either matter, recorde or witnesses must be vsed to proue the intenti-



on of the plaintife: But in sundry other causes then those two, pleas by lawe may be holden in a court Ecclesiasticall, as (I hope) manifestly and sufficiently is afore shewed in this treatise: and therefore in those other causes, laye men may and ought to answer and testifie: which is the contradictorie of that which doeth necessarily followe vpon this their interpretation. So that this conclusion being true, the contradictory of it is vnttrue, & then that vnttrue also, whereupon it is necessarily consequent. For (as I said afore) I trust no reasonable man will conceiue, that onely Ecclesiasticall men will proue detainers of such Ecclesiasticall duties, and culpable in those offences, that are proued afore to be of Ecclesiasticall conusance: nor yet that they only shall alwayes happen to be present, and able to beare witnesse in all those other seuerall Ecclesiastical causes afore touched.

Furthermore to make it more plaine and to deliuer it in seueralty, *recognitionem facere* cannot signifie in this place the answer of the partie conuented. For if a laye man against whom there is cause of action, vpon some other of the matters Ecclesiastical list not, nay if he neede not, and which is more, if (by law) he may neither come to the place, nor (being come) may answer either yea or no; the could no plea at all in any such Ecclesiast. cause be holden. If it be said, that a lay man must answer, but not by othe in such other cause: I reply againe, that either the Register hath not the writ aright printed, or els this no way can be so meant. For by the disiunctiue (*Vel*) as was said, both the one and the other is forbidden to be done. A disiunctiue argueth seuerall things, that had neede to bee expressed by seuerall wordes. And by like reason it cannot be meant of witnesses depositions: for if the partie conuented shal be content *de facto, licet contra ius*, to denie the intention of his aduersary, then no laye witnesse might in any such other cause Ecclesiasticall bee vsed, eyther to depose with othe or without othe, because both be forbidden, and so no plea in any such other Ecclesiasticall cause coulde bee holden, which is afore proued to be otherwise: and therefore consequently, that is not the meaning of these wordes of the writte, which is (by

Firzh. nou. na.  
breu. fol. 41. a.

*Fitzherbert* and others that follow him) enforced. This reading and sense of the Register that is giuen, as if no laye man might be cited by the Bishop to do either, but in those two causes; thereby withall implying, that in those two causes, lay men may lawfully be cited and vrged to doe either: doth querthrow the forme of the writte of attachment vpon such *Prohibition*. For that runnes generally and simply to forbidde both the one and the other to be



done against the parties will, not so much as excepting these two causes of Testament and Matrimonie (as the writ doeth) and therefore to auoyde contrarietie, that writ of attachment must needs bee otherwise limited, then the generalitie of the wordes doeth import.

The last poynt of the three to be touched, is concerning the true meaning of those wordes of the writ, whence these controuerfies haue flowed. It was very vsuall for men in those dayes, at making of any contracts, whether in matters of lay fee or others, for their more securitie, to make faith or othe for performance. This they either did priuately for confirming of deedes drawn betwixt them: or els (for more readinesse of dispatch and better testimony) they would recognize one to another such contractes with faithfull promise (called *fidei praestatio*) and sometimes with corporall othes voluntarily taken before Ordinaries, and thereof procure an act to be made by a public Notary. Then if either party failed in performace, he was by proces Ecclesiast. called before y<sup>e</sup> Ordinary, as to answere for an act done afore him, or *pro fidei lensione*: which failing being cofessed or proued, the Offender was enioyned grieuous penance, & compelled by censures to keepe his faith or othe, by satisfying of the other partie.

This course being so ready at their owne doores in euery Dioces, & of so speedy executio<sup>n</sup> for the great feare then caried by most sorts of men, vnto the censures Ecclesl. & grieuousnes of the penance otherwise, grew to be very vsuall in euery place, as may partly appeare by the often disputes vpo<sup>n</sup> *prohibitions* brought hereupon (euen after this writ was framed) y<sup>e</sup> are here & there mentioned in the bookes of the common law, & in part are afore touched by me in the 8. Chap. and partly may be shewed by sundry old euidences & instruments recorded in ancient legers, and in *Acts* of Ecclesiast. courts before the time of Edw. the 2. which I haue seene & perused. Namely I haue ready to be shewed, a solemne contract in writing made almost 400. yeres agoe: wherein the *Earle of Arundel* vpon a concorde then made for himselfe & his heires promisseth & granteth to the *Archbb. of Canterb.* and his successors, certain red deere & fallow of both seasons yerely for euer, to be at a certaine place deliuered for the Archbishop out of the forest of *Arundel*. For the obseruation whereof, he there bindeth himselfe & his heires, by a corporall oth taken; and further granteth, that if hee or they faile herein, then the *Archbb.* shall excommunicate them so failing, and keepe them vnder the same censure till the purport of that agreement be performed.

I haue likewise to be shewed an old writte booke of *Acts Eccles.* 23. Ed. prim.



sped in the Audience court of the Archb. of Cant. in y<sup>e</sup> reign of K. Ed. 1. wherein also sundry suites *pro latione fidei* of that nature, bee conteined. The thing which gaue colour hereunto, was the pretence of a uoyding & punishing the sinne of Periury. For the Canon law saith thus: *Iuramenti causa, regulariter quis forum Ecclesiasticum, & non seculare sortitur. c. pradicandum 22. q. & DD. in c. cum sit ex. de foro competen.* And the statute also of *circumspecte agatis* which alloweth punishment by the court Ecclesiasticall for breach of an othe, but distinguisheth not there, in what causes or how farre, did giue herein some encouragement: so that the mischiefe that grew hereupon was this: that most lay cōtracts of goods & chattels were by this meanes drawn into Ecclesiasticall courts, though (in trueth) contrary to the common law of the realme. For if the principall matter be of lay conuenance, for confirmation whereof such faith is made or othe taken; then (according to the distinction afore proued out of the common law) it is not such faith or othe that will change the authoritie of the court, to make it simply of Ecclesiast. iurisdiction. For so Bracton writing in the time of H. 3. testifieth, and withall giueth good light & euidence to the interpretation hereafter following, of those words of this writ: *Iurisdictionē regiam non mutat fidei interpositio, sacramentum prestitum, nec spontanea partium renuntiatio, quamuis sibiipsis in hac parte preiudicent per consensum: & illud idem dicendum erit de debitis & c. tallis, quæ non sunt de testamento vel matrimonio, vel eorum sequela.*

Cap. huius  
tractatus. 8.

Bracton lib. 5.  
cap. 9.

Therefore to meete with this mischiefe, this writ of Prohibition seemeth to haue bene framed, to forbid lay men in any place, either before Ordinaries, or in priuate amongs theselues, to make any recognitions or acknowledgings: whereof? of debts, or of contracts touching goods and chattels by their faiths or othes taken, in any cause whatsoever, besides testamentary or matrimoniall. For in these two causes neither then, nor at any time since (as in part is afore shewed) was it vnlawful, for lay men to make acknowledgemēt in a court Ecclesiastical euen with othe (if they thinke good) touching goods & chattels and other lay matters: In matters testamentary, as in Probats, and in legacies of goods and chattels in demaund, in matter of inuentaries and of accounts of the deads goods and chattels: In matters matrimoniall, as in money promised with a woman in marriage, as is more fully shewed in the 3. Chapter. And so this writ is not simply prohibitory of all Recognitions and Othes by laye men in Ecclesiasticall courtes, excepting those two causes: but onely forbiddeth recognitions and othes in other causes made or taken, that doe touche debts, goods and chattels, or other such laye contracts. It



It may appeare evidently, that the recognitions forbidden to bee made in Courtes Ecclesiasticall in any cause sauing of Testament or Matrimonie, ought to be vnderstood of recognitions and oathes about goods and chattels: for lightly in euery place, where these two matters of testament and matrimonie are spoken of, there also goods and chattels are spoken of to this effect, that in these two cases pleas of goods and chattels may be handled in courtes ecclesiasticall, but in none other. *Bracton* (who wrote before this writ was framed) saith thus: *Si clericus petat versus clericum vel laicum, debitum, quod non sit de testamento vel matrimonio, sequi debet forum laicale.* and againe a litle after: *non pertinet ad regem cognoscere de catallis, que sunt de testamento vel matrimonio.* Likewise in a precedent of a prohibition he vseth this addition: *nec teneatis placitum in curia Christianitatis de catallis vel debitis, que non sunt ex testamento vel matrimonio.* In the booke of *Entrees* the like is oftē found, as *attachiatus fuit ad respondendum tam Domino regi quam N. de placito, quare secutus est placitum versus eum in curia Christianitatis, de catallis & debitis, que non sunt de testamento vel matrimonio.* and in a copie of Consultation there: *callidem machinans impedire, suggerensq; in Cancellaria nostra ipsum tractum fuisse in placitum coram vobis in curia Christianitatis, de catallis & debitis que non erant de testamento vel matrimonio &c.* yea, and in the Register it is set downe more plaine a great deale in a copie at large of a Prohibition vpon the same point and with the same causes excepted being the next folowing to that which wee principally doe here treat of. for the very word of *Recognitio* before an Ordinarie is there vlied and applied to a debt or contract touching goods and chattels. *Cum recognitiones debitorum (que non sunt de testamento vel matrimonio) ad nos, coronam et dignitatem nostram (et non ad alios) pertineant in regno nostro: & executiones earundem per nos & ministros nostros (et non per alios) fieri debeant: ac iam ex querela I. acceperimus quod vos ipsum I. ad viginti solidos, quos coram vobis nuper in curia Christianitatis recognouit se debere A. eidem A. solucndos intra certū tempus iam prateritum monuistis, & in ipsum I. pro eo, quod predictos viginti solidos intra tempus predictum, ad monitionem vestram soluere recusauit, (quanquam huiusmodi recognitio testamentum vel matrimonium non tangat) &c. excommunicationis sententiam fulminastis &c. vobis prohibemus &c.* and the very like wordes, to the same effect, and with like exceptions, are there vsed in the fiue precedents of prohibitions, next in order following. The very writte it selfe set downe by *Rastall* at large, doth establish this interpretation: *Rex episcopo Norwicensi &c. salutem. Cum cognitiones placitorum,*

*Bracton lib. 5. cap. 2.*

*Ibidem.*

*Idem lib. 5. cap. 3. & cap. 10. & 13.*

*Prohib. & Consul. nu. 3. & 7.*

*Consultat. 2.*

*Register. Ibidem tit. Prohibitionis.*

*Abridgement of the statutes. Prohibition. 6.*



*&c. super iuratis Recognitionibus laicorum feodum contingentibus, & rebus alijs ac causis pecuniarum, & alijs catallis & debitis (quæ non de testamento vel matrimonio) ad coronam & dignitatem nostram pertinent &c.* for, if in the same writ they shoulde signifie diuers things, then must wee needes say, that the recitall speakes of a thing to bee remedied, and yet the remedie giuen is of another nature, and so not pursuant to the former matter. Furthermore, the tenour of that writ runneth to the *Bishop of Norwich* and to his *Archdeacons &c.* yet those wordes thereof, (whereupon the doubt riseth) are not directed to them, as if they shoulde bee charged thereby, not so to cite lay men, or that they shoulde not charge them with such oathes, or that they should not suffer such *Recognitions* to bee made afore them: but it is there sayde, that the king had commanded the *Sherife*, that he should not permit, *quod laici conueniant in aliquibus locis ad faciendas recognitiones &c.* which vse of the wordes *ne laici conueniant*, and the changing of the persons, argue strongly to be meant of such *recognitions of debts and chattels*, and such oathes, as lay men of them themselues were willing ynough to make, and therefore had neede of such restraint by the *Sherifes* authoritie. which their voluntarie perfourming thereof without vrging by censures, is also argued by that which is there sayde of the *Ordinaries* accepting at laye mens handes of such things: *vz. vobis premissa, & alia consimilia, in paratibz illis, acceptantibus.* This also of their willingnesse without constraint, is prooued by the wordes immediatly following the poynt in controuersie. *vz. & ne super huiusmodi feodis, debitis & catallis coram vobis & alijs iudicibus Ecclesiasticis in preiudicium iurisdictionis nostre regia ad coronam & dignitatem nostram spectantibus, subire presument.*

Whereby (as in a thing needefull) laye men are charged not to dare or presume in any other causes before *Ordinaries* to make any such *Recognition or oath* touching goods or chartels preiudiciall to the crowne. Nowe if those words in the copie of the *Prohibition* and of the *Attachment* in the *Register* shall be obiected against this, *vz. Ad citationem talis episc.* And those: *Contra voluntatem partis:* I answer, that he out of whose copie the *Register* was printed, did otherwise (as it seemeth) vnderstand it, and therefore vsed those wordes for explanation according to his owne meaning: or els was willing they should be so vnderstoode, which perhaps enduced him to make such a brieve Abridgement of so long a writ. But the former wordes set downe at large in the writte it selfe (where none of these

last



last recited wordes are to bee founde ) are too cleare in this poynt to be dimmed by any such colours. But if here it bee replied, that witnesses may take oath and depose willingly in other Ecclesiasticall causes at the request of some of the parties: I must then call to their minde, that I haue shewed afore, that ( according to their owne interpretation ) they may not, yea though they be willing. But though witnesses might if they were willing, yet wee cannot entende, that the partie to bee sued will come at all, much lesse answere, if he may not bee compelled vnto either. And the wordes reach vnto all lay persons, not distinguishing a party from a witness. Againe, by that their interpretation of *Recognition* and *oath*, they coulde neuer haue such witnesses that be indifferent. For if witnesses may not be vrged to sweare or to answere further then they list themselves; then will they onely answere to the matters propounded by him who produceth them, and will refuse to answere the Interrogatories propounded by the other partie for his defence by whom they were not requested to come. Which course taking away professedly, and in trueth all testimonie that ought to bee indifferent for either partie in such pertinent matters as are to bee demaunded, is contrary to the lawe of God, of nature, of nations, and to the very qualitie of a witness: and so being most vnreasonable, therefore that whereupon it followeth, must needes bee also very absurde, and against Iustice.

In the bookes of the common lawe I finde also some cases, that giue strength to this interpretation, For an attachment vpon a Prohibition was sued, because they sued in a spirituall court for haye and money, which touched neither matrimonie nor testament: and after vpon shewing the Libell, which prooued that it was for tithes and oblations, a consultation was granted. Likewise a Prohibition was sued forth of the Chaucery ( directed to the Iustices of the common Pleas ) to make an attachment, because the defendant had sued the plaintiffe in the spirituall court for debt, which did not touch matter of matrimonie nor testament, whereof the consifance belongs to the kings Court: and thereupon a prohibition was granted thence. Wherein it was worthie the noting, that Fitzherbert ( in his Abridgement ) leaueth out these wordes ( for debt ) and in steade of these wordes ( *don't le consifance* ) hee putteth in these ( *mes appent &c.* ) contrary to the booke it selfe at large, and also to Brooke. I will not say it was to giue colour to his opinion in his *Natura breuium*, as if he ment to haue it sound, that no matter at all, but either matrimoniall or testamentary, might be sued in court spirituall: whereas

M.44.E.3.  
fol.32.

M.38.H.6.  
fol.14.

Fitzh. Prohibition. nu.5.

Brooke. Prohibition. nu.6.



whereas by these two reports it may appeare, that *Prohibitions* did not lie in this respect that the parties were sued and called into the Ecclesiastical court against their willes in any other cause whatsoever then those two: but onely, for suing there for *chattels and debt*, which did touch neither *matrimony nor testament*. and (I thinke) it cannot bee shewed in any the reports of the common lawe, that euer any *prohibition* (not reuerfed after by *Consultation* if it came to argument) nay perhaps none at all, hath euer bene awarded in this respect onely, that laye persons were cited to answere, or to testifie vpon oath, in a cause neither being testamentary nor matrimoniall, so it were such (as is aforeprooued) to be of Ecclesiasticall conusance. Whereof may be gathered, that euer since the first framing of this writte, either none in this poynt hath knowen the lawe vntill *Fitzherbert* (for *non est instandum in proposito*: ) or else those words doe carry an other meaning then is now fathered vpon them: which that they doe both in the affirmatiue for ours, and negatiue against theirs (I hope) is somewhat plainly prooued. And therefore wee may conclude, that these two last opinions, *the one for not citing any person*, in any other cause then these two: the other for *not citing laye men to take oath, in any other cause, but either testamentarie or matrimoniall*, are voyde of all ground of lawe: nay are contrary to statute lawe, to common lawe, to practise for time immemoriall, and also vnto reason.

## CHAP. 15.

*That iudgement of heresie still remaineth (at the common lawe) in Iudges Ecclesiasticall: and that the Prouiso touching heresie, in the statute 1. Eliz. cap. 1. is only spoken of Ecclesiasticall Commissioners thereby autorised.*



He two other opinions remaining that respect the matter handled by Ecclesiastical iurisdiction (and come next to be treated of) for the affinitie of the matter, and because they both depend vpon one and the selfe same groundes, I purpose briefly to handle together: v<sup>z</sup>. *whether the Iudgement of heresie nowe lieth rather in the common lawe, then Ecclesiasticall: and whether nothing may at this day bee adiudged heresie, but according to the statute* 1. Eliz. cap. 1. *primo of her Maiesties reigne*: For in the true vnderstanding of that statute, the decision of these two opinions will wholly rest. It seemeth by the latter of them, that the authour thinketh, that before the statute 2. H. 4. Ordinaries at the common lawe might not by their iurisdiction Ecclesiastical, proceed to the condemnation of an hieretiques and



and therefore (all former statutes made against heretikes, standing now repealed) he gathereth, that no heretike may be dealt with but according to the said statute made in the first yeere of her Maiesties reigne. This opinion (it may be) he gathered out of *Fitzherbert* his *Nona natura breuitum*: yet I thinke rather it was his owne conceit, both because he doth not allege *Fitzherbert* for it, and for that *Fitzherbert* leaueth (euen at the Common law) authority in the whole Conuocation of a prouince, to condemne an heretike (which the author hereof simply denieth to remaine) albeit he there holde, that (at the Common law before such statute) a bishop in his diocesse could not so condemne. But I haue shewed in the fourteenth chapter hereof, by very great and good opinion, the law in this point to be mistaken. For prooffe that it is so, I touched it something in the eight chapter, *vz.* in the preamble of the statute, *The diocessans of the Realme then complained that they could not by their iurisdiction spirituall (without ayd of the royall Maiestie) what? not at all? Nay, but not sufficiently correct nor restraine the malice of heretikes: Why? because they wanted authority at all to deale with them. No, but because the heretikes goe from diocesse to diocesse, and will not appeare before the diocessans, but contemne the keyes of the Church, and censures of the same.* So that, had it not bene for their fugitiuenesse, their refusing to appeare, and contempt of the keyes, the Ordinaries diocessans had iurisdiction spirituall to correct and restraine them: in which respect, and for better assistance of their former iurisdiction, it was then first provided, that heretikes should be attached, and imprisoned. Two other authorities out of statutes I there (in the eight chapter) alleged also, to this purpose. The words of the statute made *primo* of her Maiestie (from which this second opinion is gathered) doe make the matter cleere, that nothing thereby is meant, but that Commissioners for causes ecclesiasticall according to that act (commonly termed the high Commission) shall not haue authority to adiudge any matter or cause to be heresie, but onely such as hath bene so adiudged by the authority of the Canonickall scriptures, or by the first foure generall councelles, or by any other generall counsell, wherein the same was declared heresie, by the expresse and plaine wordes of the Canonickall scriptures. So that the iurisdiction of Ordinaries and of the Conuocation still remaineth as it did afore at the Common law. But I muse greatly what colour or pretence he could haue, to gather the first of these two opinions out of the aforesaid words: for doth or can he thinke, that the ordering, determining, or adiudging of a

*Fitzh. ibid. fol. 169 D.*

*2.H.4. cap. 15.*

*1.Eliz. cap. 1.*



matter to be heresy by the Commissioners Ecclesiasticall (there spoken of) is a iudgement at, or according to the course of the Common law? Or shall it be imagined, that wheresoever any matter by occasion comes in to be mentioned in a statute (as for example, naming matters of faith, mentioning errors in doctrine, or the doctrine of the Sacraments) that the determination of all such points, & what and how many speciall matters are contained vnder those generall heads whatsoeuer; shall, by reason of such incident mentioning of them in a statute, be put ouer to the iudgement of a iury, or to the determination of temporall Iudges? What other may conceiue, I know not; for my part, I must take it (till I be better informed) to be so simple a conceit, as is woorthy to be dismissed rather with laughter, then confuted with further reason.

CHAR. 16.

*That by the statute, her Maiesty may commit authority, and they may take and vse for Ecclesiasticall causes attachments, imprisonments and fines.*



He next opinion that comes to be treated on, is: Whether the *Queenes Maiesty* by her letters patents vnder the great seale of England, may authorise the use of any other processe in matters Ecclesiasticall then by citation: as by letters missiue, attachment, or such like? whereunto I adde the other two of the same author, and depending vpon the same string: whether her highnesse may so authorise the use (in matters ecclesiasticall) of any other coercion or punishment, as by fine or imprisonment? these opinions if they be not well grounded vpon law, seeme to me to touch her Maiesties prerogative royall, and supreme gouernment very deeply, whosoever be authour of them. And if this authority that is hereby impugned, be in truth a preheminence vnited and annexed to the Imperiall crowne of this realme by parliament: if he be a man of any quality, so that he hath taken the oath of obedience, let him take good aduise,ment, how it may stand with such his oath and allegiance. They are pretended to be grounded vpon these words of *Magna charta*, v. *No free man shalbe taken or imprisoned, or be disseised of his free hold or liberties, or free customes, or be outlawed, or exiled, or any otherwise destroyed, nor we shall not passe vpon him nor condemne him, but by lawfull iudgement of his peers, or by the law of the land.* But the end why this law was made, and the time when it was made, are needfull to be considered: the end was this, that the kings of this realme should not challenge an infinite and

Magna char.  
cap. 29.



an absolute power to themselves, as without iudgement and lawfull proceeding, to take away any mans liberty, life, countrey, goods or lands. And it was at such time, when the kings themselves thought, that iurisdiction Ecclesiasticall was not in right no more then it was in fact, belonging to the crowne: therefore in that it is here said, *We will not passe upon him, nor condemne him, but by lawfull iudgement of his peeres; or by the law of the land;* it is manifest, that the words haue no relation to the iurisdiction ecclesiasticall: for that which was done by that iurisdiction, was not at that time taken to be done by the king or by his authority: nor the lawes that Ecclesiasticall Iudges practised, were not holden to be the lawes of the land, or the kings lawes; as (since the lawfull restitution of the ancient right in that behalfe to the crowne) the be often called, *The kings or the queenes ecclesiasticall lawes.* And it is well & notoriously knowne, that proceedings and condemnations Ecclesiasticall, were neuer made by the iudgement of a mans peeres, *vz.* by a Iury: and therefore those words rehearsed, can not be so farre extended, as to include that iurisdiction. Yet as institution vnto a benefice, both before & after *Magna charta* belonged alwayes to Ecclesiasticall persons and iurisdiction; so did also the destitution or deprivation from a benefice, in which respect bishops (that claime not the patronage) do alwayes plead to a *Quare impedit*, thus, *Nil clamat preter institutionem & destitutionem clericorum ut Ordinarius in dicta rectoria de A. &c.* whereby may appeare that a man might by law be disseised or put out of his benefice (being his freeholde) otherwise then according to the forme of that statute.

1. Eliz. cap. 2.  
& pass. alibi.

I have also proued in the chapter next afore, and in the eight, and the fourteenth chapters, that an Ordinary in his diocesse (euen at the Common law) might condemne a man for heresy; whereupon (after committing to the secular power) such an heretike was put to death by burning: but this was not done by any iudgement of his peeres, and therefore those words of *Magna charta* are no way to be construed of any iurisdiction Ecclesiasticall. Furthermore, besides iudgement of a mans peeres, there is added, *or by the law of the land:* the reason hereof was (as I take it) for that there were other iudgements then by a mans peeres, as vpon standing mute, & vpon triall by battell.

Now, seeing all iurisdiction and authority in this realme, as well ecclesiasticall as temporall, was euer in right, but now is also iustly acknowledged, and is in fact vnited & incorporated vnto the crown of this realme: therefore inquire, whether it may not be probably said (albeit not according to the vsuall speech) that a iudgement duly gi-

uen



uen by the iurisdiction ecclesiasticall, is giuen by the law of the land: but this cloud, or rather mist, which they would cast, is plainly dispersed by the first chapter in *Magna charta*: for thereby is made a flat distinction and seuerance betwixt the grant there made to God, with confirmation of the church of Englands freedome, rights, and liberties for euermore, from those grants that are after made to other the freemen of the whole realme, in the rest of that charter: so that the iurisdiction of the church, cannot be intended to be meant in any of all the rest, except it had bene particularly expressed. Yet if those words were admitted to be meant and stretched forth vnto that iurisdiction also, will not statutes made by the like authority of parliament, sufficiently qualifie or impeach them? As these opinions do only reach & shoot at the commission Ecclesiasticall, to impound and streine the authority thereof vnto so narrow a roome, as that her Maiesty should thereby haue no seruice done by those her subiects which are imployed therein, wherby the fantasies of the fauorites of these men might freely grow without discouery, or any such penalty as they thinke they need care for: so for the iust defence herein of that commission, I may allege the words of the same statute, whereby it is established, *vz. they shall haue full power and authority, by vertue of this act, and of the said letters patents under your highnes, your heires or successors, to exercise, vse and execute all the premisses, according to the tenour and effect of the said letters patents, any matter or cause to the contrary, in any wise notwithstanding.* By which words, *tenor literarum*, is signified whatsoever tenet in se, *vz.* that which is expresly contained in them: by the effect of them is vnderstood whatsoever is within the true & vnforced meaning of any such letters patents. So that if attachment, fine, imprisonment, &c. bee either in the letters patents expresly contained, or vndoubtedly meant by them; then the vse & exercise of these, shal thereby sufficiently be warranted & authorised vnto her Maiesty for granting, & to the commissioners for so executing. And if any doubt (otherwise) might be made, yet there be two clauses in the words aforesaid, that be called *verba sine clausula operatiua* in the ciuill law, and do therefore supply many defects and wants in the exercise of a iurisdiction delegated by the princes rescript. The first of them are those words, *Full power and authority*: and the other is, the generall *non obstante, intranscendenti*, *vz.* of any matter or cause whatsoever.

But to all this is answered, that these words, *vz. according to the tenour and effect of the said letters patents*, do worke thus much: that her Maiesty need not grant all, but so much iurisdiction as her highnesse thinketh

1. Eliz. cap. 1.



thinketh meet: and that so many or few of them (so they be two at least) may thereby bee authorised vnder her Maiestie, to exercise such Iurisdiction. It is true, that those wordes so worke and tende to that effect: but doeth it hereof followe, that nothing else is meant or comprehended thereby? Nothing (say they:) for other proceſſe then citation, or other censures or punishment then excommunication, &c. her Maiestie cannot commit vnto them: else might she also giue them authoritie to hang men. What? is there no more difference with them betwixt attaching, fining or imprisoning, and plaine hanging? What will they then say of the Starre Chamber, which may impose all those three, and yet cannot put any man to losse of limme or of life? and this is great reason. For we are taught by the Ciuill lawe, (and I thinke it is agreeable also to the lawes of the land) that wheresoeuer an authoritie is giuen (in neuer so generall or pregnant wordes) it cannot be drawen forth to reach vnto any mutilation of limme, or paines capitall, except they be plainly expressed.

But this matter (if the wordes of that whole clause be aduisedly weied and considered) will otherwise be made most plaine. In the exercise of a criminall Iurisdiction, there is the matter, wherein it is bestowed, the maner of conuening, and the penaltie or sanction to be inflicted vpon offenders, that are to be considered. Now the matter of this Iurisdiction and authoritie granted to her Highnes, and to be assigned ouer by her Maiestie vnto Commissioners, is *visiting, reforming, redressing, ordering, correcting, and amending all such errors, heresies, schismes, abuses, offences, contempts & enormities whatsoever, which by any spirituall, &c.* But what course is to be holden in calling & conuening, and what kind of penalties or censures shall be inflicted vpon offenders by that authoritie, are by no wordes of that acte either granted to her Highnes, or mentioned that they may be assigned by her vnto the Commissioners, either expressely, or yet by implication, if they be not supplied by those generall words, viz. *According to the tenour and effect of the letters patents.* And so (by such an interpretation) we should haue matters for a Iurisdiction, but neither any maner to conuent and compell to come afore the Commissioners, nor yet punishment to lay vpon enormous offenders, against whome it was intended. Which because it is very vnreasonable, therefore that opinion whereupon it necessarily followeth, must needs be more absurd, and without ground of reason.

Yea (say they) be this as it may, and let them seeke out what proceſſes, &c. may and shall be vsed by the Commission Ecclesiasticall:

for



for it is contrarie to the lawe to grant (by Commission) authoritie to inflict any punishment vpon a fault, which by lawe ought not to be inflicted: and therefore they gather the Queene cannot authorize, nor any man may take power to attach, to fine, or to imprison men by that Commission. Thus farre it is true, that a Commission may not be graunted to alter or change any lawe in force: but I trust it is not contrarie to the Common law and custome of the Realme, by acte of Parliament, to alter and change that which stood otherwise afore, at the Common law. By the course of the Common lawe, no man may be put to the racke or torture (especially about felonies or murders) thereby to drawe him to confesse of him selfe, or of other men his complices: Yet is it notorious, that in Wales and the Marches thereof, the President and Counsaile there established, do vse, and lawfully may put men to such torture, by warrant of instructions onely sent vnto them from time to time, vnder her Maiesties gracious hande.

38.H.8.ca.28.  
Rastall.Wales  
32.

This their authoritie (I take it) is deriued from these wordes in an Acte of Parliament. *The President and Counsaile there, shall haue power and authoritie to heare and determine, by their wisdomes and discretions, such causes and matters, as be or hereafter shall be assigned to them by the Kings Maiestie, as heretofore hath bene accustomed and vsed.* Which do containe no more particularitie of authoritie, nor yet are of any more pregnancie to that purpose, then the wordes (that establish the Commission Ecclesiasticall) bee for attachment, fine, and imprisonment to be vsed, if it shall please her Maiestie so to commit them.

The deuise of the Commission Ecclesiasticall was for assistance and aide of Ordinarie Iurisdiction Ecclesiasticall, and for rounder proceeding and for more grieuous, at least punishment (in these dissolute times) more feared, then can or may by Ordinarie Iurisdiction be inflicted. Therefore, if by the generall words of that Acte, 1. Eliz. both these proceedings whereof we here speake, and many other particularities of manner, persons, times, places, and other circumstances might not be warranted: then the authoritie there giuen to her Maiestie were of none vse at all, neither could it possibly be practised.

But I thinke this power here by these opinions impugned, may be prooued directly out of the words of the very Acte, thus: *whatsoeuer by any spirituall or Ecclesiasticall power or authoritie hath heretofore bene or may lawfully be exercised or vsed for visitation, &c. or reformation, &c. of all manner errors, &c. and enormities whatsoeuer, that is vnto the Crowne, and by that Acte may be assigned ouer by her Maie-*  
stie:



tie: But attaching, imprisoning, and such like corporall coercion by some Spirituall or Ecclesiasticall power or authoritie, hath lawfully bene exercised: And therefore may be appointed by her Maiestie to be exercised by the Commissioners Ecclesiasticall. For prooffe of the *Minor*, I am to put you in minde what corporall punishments and chastisements the superiors of euery regular person, as of *Monke*, *Fri-er*, and *Nunne*, might and did lawfully from time to time laye vpon them that were vnder their Ecclesiasticall obedience, and yet (euen after their professing) they remained still the Kings subiects. Likewise, when the statutes against heresies were in force, these attaching, imprisonings, and other corporall chastisements were then lawfully exercised and vsed by Ecclesiasticall power and authoritie.

1. H 7. ca. 4.

Lastly, *Bishops and Ordinaries may punish and chastise Priests, Clerks, and religious men within their Iurisdiction, being convicted of incontinencie, by committing them to warde and prison, there to abide, for such time as shall be thought to their discretions conuenient, for the qualitie & quantitie of their trespasse.* So that we may conclude, that if any such power haue bene vsed, then her Maiestie may (as it please her) vse and appoint the same to be vsed by her Highnes Commissioners.

## CHAP. 17.

*That an Ecclesiasticall person may be depriued of his benefice without enditement or prosecution of partie: and that after 40. daies an excommunicate person may be otherwise punished, then vpon the writte De excommunicato capiendo.*



In the next opinion, I minde to be very short: it is this, that by none Ecclesiasticall authoritie, a man may be depriued of his benefice (which is his freehold) being not indited, and no suite of partie offered against him. Whereby (wee see) he requireth both an inditement, & a suite of some partie. It seemeth his meaning is, that a Minister cannot be depriued, but by way of inditement at the Common lawe, and that the Iudge of Office may not preferre such inditement, but it must needs be at the suite of a partie. I cannot well coniecture, whereupon he pretendeth to ground this opinion. If vpon the 29. Chapter of *Magna Charta*; it is shewed in the Chapter next precedent, not to be vnderstoode of Ecclesiasticall Iurisdiction, or of the practise thereof. And moreouer, that Chapter requireth no suite of partie to preferre the inditement, so that it may be done by the Iudges of Office well ynough.

But



But this conceite is very strange, that Bishops shal not haue authoritie to depriue an Ecclesiasticall person from his benefice. It is shewed in the Chapter afore, that by vsuall and allowed course of pleading to a *Quare impedit*, the Ordinarie doeth claime (as of right) *institutionem & destitutionem Clericorum*, in benefices within his Iurisdiction. For the olde rule was, *cuius est instituere, eius est destituere*. But perhaps it will be saide, he meant, that a Bishop might doe it, but not of office, that is, without a partie, albeit he put a Copulative in in steede of a Disiunctiue. But, what priuiledge or benefite is this to the partie conuented, to bee prosecuted by a partie, (and therefore perhaps of malice and by subornation of proofes) rather then by the ordinarie proceeding of office and dutie, for whose sinceritie, we may more probably presume and intende? Then further, what if one that hath a benefice will come vnto the Bishop, and there stoutly defend Atheisme, Apostasie or denying of Christ, or any other heresie, grosse blasphemie or idolatrie: may he not (till some accusor be founde, or a partie to prosecute) depriue such a person from his benefice *ex Officio*? What if the beneficed person will confesse before the Ordinarie, that he was neuer called to the Ministerie, but hath vsurped it, by colour of forged testimonials of Orders: or that he hath committed Simonie, Incest, Adulterie, or hath two wiues liuing at once, or that he neuer subscribed nor read the Articles of religion, or being once conuicted, doe againe defende some error against such Articles: may not the Bishop *ex officio* in all or any of these cases depriue or declare his benefice voide, except some other will come and make him selfe a partie? But that he may doe it, appeareth by the statute 1. of her Maiestie: for there it is saide, he may enquire (which is alwaies *ex officio*, as shall be more plainly shewed in the second part) and punish by *Deprivation, &c.* as in like cases hath bene vsed by the *Q. Ecclesiasticall lawes*.

1. Eliz. ca. 3.

The last opinion to be handled in this first part, is this: that an *excommunicate person standing so aboue 40. daies, may in none other sorte be punished then upon the writ de excommunicato capiendo*. This is easily impugned: for he may be punished for absence from diuine prayer. neither shall his excommunication excuse him, for it is in his owne default. Besides, it is a great *contempt*, and punishable also by the Ecclesiasticall Commission, by the expresse wordes vsed in that Acte, which doeth establish that Commission. And this standeth with great reason, where there are great numbers of such wilfull persons, or slacke execution by Vnder Sheriffes and Bailiffes of that  
writte



writte, as often falleth out: besides the great charges in suing of it out. So that I dare auowe, in sundrie Diocesses in the Realme, the whole yeerely reuenues of the seuerall Bishops there, woulde not reach to the iustifying of all contemnours (beeing of the baser sorte of persons) by the course of this writte. They might happely to the great charge of the Shire keepe many of them in prison long ynough: yet they shoulde neuer procure the fees backe againe that must by them be defrayed.

Lastly, the lawe Ecclesiasticall very reasonably and grauely prouideth in this behalfe: that if a man stand excommunicate aboue an whole yeere, he may bee proceeded with for suspicion of heresie: because the lawe presumeth that such a man hath small feeling of religion, but rather contemneth it, and nourisheth some damnable opinion against God and his Church. And therefore, such an excommunicat person, may be punished by reason thereof, otherwise then by that writ. And thus much for the first part of this

Treatise.

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The end of the first part.

8 NO 58

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## The contents of this second part.

- 1 **H**OW the foure opinions put over to this place fall in with the challenges of the Innouators, and the generall distribution of this second part.
- 2 Three wayes of proceedings against crimes and the course therein vsually holden as well in the Courts of Ecclesiasticall Commission, as in Ordinarie courts.
- 3 That proceeding to enquiry against faults, without either information by bill, or indictment, (which respectiue do resemble Accusation and Presentment in Courts Ecclesiasticall) are both allowed, and in good equitie are sometimes used in the course of Temporall proceedings in this Realme.
- 4 That by the Canon and Ciuill lawes, sundry other inducements are allowed for a Iudge to ground an enquiry of office vpon, besides accusation and presentment by officers specially thereunto appointed.
- 5 Of the necessary and manifolde vse and equisy of proceeding by enquiry of office, both in Ecclesiasticall and Temporall courts and matters.
- 6 That the lawes of the Realme do vse enquiries & proceedings ex officio, that they allow it in courts Ecclesiasticall, with answere to some obiections that are made to the contrary.
- 7 That the enquiry ex officio, against crimes, is allowed both in Ciuill or Temporall courts, and in Ecclesiasticall also, by those two lawes Canon and Ciuill.
- 8 That the enquire and proceeding of Office, without an Accuser, is approoued by sundry examples of Scripture, with answere to some obiections to the contrary.
- 9 The lawfulnessse of oathes: what an oath is: resolution of some vsuall and not vnecessary questions about oathes: and the reason, or originall formall cause of the vse of oathes.
- 10 Diuisions of oathes according to the outward forme of taking them: according to the matter, and inward forme of them: with plaine descriptions of euery severall kinde of oath.
- 11 That the ceremonies vsed in taking and giuing corporall oathes, with laying hands vpon the Bible or Testament, and swearing by the contents of it, are not vnlawfull.
- 12 The manifold equitie and necessitie of an oath, sometimes to be ministred in a cause criminall and penall vnto the partie.
- 13 That oathes of men touching matters damageable, criminall and penall to themselves, are vrged and exacted by the course of the lawes of this Realme.
- 14 That such oathes, by the lawes of the Realme, are allowed vnto Ecclesiasticall courts.
- 15 That such oath is allowed both by Canon and Ciuill lawes, and how farre: and that the like is establisht and thought equall by the lawes and customes of other nations.
- 16 That not onely by the worde of God such an oath may be taken, but also being by the Magistrate duely commanded to be taken, ought not to be refused.
- 17 Foure severall opinions of the Innouators against the parties taking of oath in criminall causes, with answere to their reasons and obiections.
- 18 That a man being charged by authority to discouer his knowledge touching that which his Christian brother hath done, whether it be an offence, or a lawfull action, is bound to reueile it, though it may breed trouble and punishment to his brother: and the reasons to the contrary answered and refused.
- 19 Their arguments are answered, that condemne the ministring and taking of an oath to be vnlawfull, because they haue not distinct knowledge giuen vnto them of euery particular, before the taking of it: and the like course (by examples) is approoued lawfull and godly.
- 20 That after the partie hath answered vpon his oath, it is neither vnusuall, vnlawfull, nor vngodly, to seeke to conuince him by witnesses, or other triall, if he be supposed not to haue deliuered a plaine and full trueth.



## THE SECOND PART.

## THE FIRST CHAPTER.

*Howe the foure opinions put ouer to this place fall in with the Challenges of the Innouatours, and the generall distribution of this second part.*



His second part of this treatise containeth our proofes (together with answers to their obiections made against the forme of practise of *iurisdiction Ecclesiasticall*) who doe euen professe themselves to indeuour an innouation in the frame of gouernment of this Church of *England*. But it is not meant in this place to handle all which they object in this behalfe, but onely some such of them, as touch the maner and forme of the proceedings in the exercise thereof. For it is knowen they take sundry other exceptions against the maner of *calling to function Ecclesiasticall*, against the *ordination*, against sundry the *callings* and the *functions themselves*, against deriuing of the *iurisdiction Ecclesiasticall* from the *Prince*, against the *matters handled* by that iurisdiction, and against the *maner of handling* them in sundry other respects, condemning them as *Antichristian* and contrary to Gods word. All which are of another consideration, and not fit here to be ripped vp.

I finde foure opinions (pretending that the lawes of the Realme be against the maner of entrance into some suites, and against certaine proceedings ecclesiasticall) that are mentioned in the *Preface* to haue bene put off vnto this place, for auoyding of needelesse repetition, and as falling here more fit to be discussed, amongs other like obiections of the *Innouatours*.

The first of them that wee put ouer into this place is, that an *Ecclesiasticall court* may not proceede without *accusation* or *presentment*: If this were true (according as the proprietic of the words importeth) then *Ordinaries* might not so much as deale in those two excepted *causes* of *matrimonie* and *testament*, nor in any other concerning *rights* and *dueties Ecclesiasticall*, but onely in offences and *crimes* punishable by that iurisdiction. For an *accusation* or *presentment* hath none vse, but in matters of *crime* or *offence* incident vnto that iurisdiction to punish. But (I thinke) the Authour of it meant by *Accusation* any suite of *Instance* where there is some partie against the de-



fendant: yet dooth this opinion neuertheless contradict the next following. For it implieth, that if the matter bee Ecclesiasticall, and that there bee either accusation or *presentment*; then may the Iudge Ecclesiasticall proceede, so that if there be but a *presentment* without any accusation, his proceeding without a partie, which is to proceede *ex officio*, shall be warranted. Whereupon doth followe, that proceeding *ex officio* is not tied to those two causes onely of *Testament* or *Matrimonie*, as the next opinion doth holde.

For the second is, that *no laye person may bee cited ex officio in any cause, but either testamentarie or matrimoniall*. Concerning the citing of laye persons, absolutely in any cause besides those two, ynough hath bene sayde in the former part. So that in this opinion the citing *ex officio* onely remaineth needeful further to be spoken of. In which, if the authour of it had vnderstoode what he writ, hee would neuer haue put it in the tale or reckoning. For of all other causes Ecclesiasticall whatsoeuer, there can bee least vse of proceeding *ex officio* in those two: because the chiefeft and almost only vse of it is, in dealing against *crimes and offences*. But I will bring these two into a brieft, and as neere as may be to some concord. The first seemeth to permit it in an Ecclesiasticall matter, so there be a *presentment* precedent. The second condemneth proceeding without a partie (sauiug in those two cases) and so in effect in all causes.

The third of those opinions is, *that albeit a matter be duely presented against a man, yet he may not be examined vpon his oath, as of incontinencie or such like*. Whereby (I thinke) it is meant, that hee may not be so examined of any criminall and penall matter. The last opinion of the said foure, is: that *no man is bound to declare any matter against another, except there be some, that is an accuser*. So that by this last, no witnesses shall euer be had, when the Iudge proceedeth *ex officio*, except themselues list, which commonly none will thrust himselfe into, but vpon some pique or humor of enmitie. Which being ioyned to the former, that *albeit a matter be duely presented (that is criminall, and may be penall to him) yet he may not be examined of it, vpon his own oath*: doth come to this passe, that of an Ecclesiasticall crime, there is, (by lawe) no way to conuict a man, except some man will bee an accuser, or els by voluntarie witnesses *qui sese ingerunt ad testimonium*: v. z. such, whome the very lawe of nations doth entend to be enemies vnto the partie.

You are not to marueile that the opinions of those, who shoote at one generall marke, are so absurd, and doe so varie and iarre among



mong themselves, & confront one another. For you remember, *uno absurdo dato, multa consequuntur*: and that truth is simple, constant, & like it selfe, & therefore no truth is disagreeing from another truth: whereas vntruth is manifolde, & variable from it selfe. For two contraries can neuer be both true, but they may bee, and are oftentimes both of them false. The first of these taketh away all proceeding either in crimes or any other causes where there wanteth an accusation or such presentment, as y<sup>e</sup> author of it meaneth. The second (in effect) taketh away all proceeding *ex officio*, but especially in crimes & offences. The third impugneth all examinatio<sup>n</sup> by the oth of y<sup>e</sup> partie, in a matter criminall & penall. The last would ouerthrow all vrging of witnesses to testifie, in a cause moued *ex officio* v<sup>z</sup>. where there is none accuser nor party besides the Iudge, & his publike office or dutie that moueth him, yea though there be a solemne presentment.

These foure challenges (amongst others) are made against iurisdiction Ecclesiasticall, by the Innouators also themselves (being first instilled into them by some that professe the common lawes of the Realme) not onely for the pretended contrarietie vnto the lawes of the Realme, but for contrarietie also to Canon lawe, to *Ciuitill* lawe, to Gods lawe, and vnto reason.

Both their other exceptions, that of late haue bin taken by any of them and stirred vp against the maner of exercising iurisdiction Ecclesiasticall (so farre as I can learne) and also these foure last recited falling in with them (albeit all such their opinions bee not holden by euery of them, but according to the varietie of their humors and seuerall capacities) may all be reduced (not vnfitly) vnto these two heads. They doe respect, eyther *the manner of entrance into the suite*, or els *the forme of proceeding in it*. In the manner of entrance (you see) they challenge it, eyther for that it is not *as the suite of some accuser, or upon a solemne Presentment*: Or for being *ex officio* in any other cause, then those two, wherein (in very deede) such proceeding hath none vse. In the course of proceeding in the suite, they take exception, partly against some principall acte therein vsed: and partly against some meaner circumstances. In that more principall acte (whereof I meane) they impugne eyther *the examination vpon othe of the partie himselfe*, or *the examination of witnesses*. Touching the othe of the partie, both fault is found by some with the ceremonie used in giuing the othe, and because the othe is giuen in a cause criminall and penall to themselves. In the ceremonie at taking othe, there is reprehended (by some) *the laying of the hand on a booke, and the swearing*



by the booke or by the contents of it. Of meaner circumstances (falling out in proceeding) that they challenge, some are concurring with the very tender of the oath (as that they have not distinct knowledge of every particular, whereupon they are to be examined, before they resolve, whether to take the oath or not: and other are ensuing the oath and examination: as that the Judges doe not rest in that which is affirmed or denied upon their oath, but oftentimes proceede to a further examination by witnesses, upon the same payntes. All which I minde (God willing) to prosecute, in the same order that I haue heere set forth.

### CHAP. II.

Three wayes of proceedings against Crimes: and the course therein usually holden aswell in the Courts of the Ecclesiasticall Commission, as in Ordinary Courts.



IRST therefore wee are to treat touching proceeding sometimes vsed without eyther accusation or presentment. Wherein (as in the rest) for your better vnderstanding of that which followeth (because you pretende you are not sufficiently instructed in the nature and qualities of these proceedings) I will open some fewe matters, which I take to serue for that purpose: Not that I minde to treat of them exactly with curious Definitions, Diuisions, Subdiuisions, Rules, Exceptions, and so forth (as those that bee Lawyers can) but onely to giue a taste of some principall poyntes, thereby to giue some light vnto the matters in handling. All iudiciall courses, are cyther in matters Civil or criminall. In Civil, the partie that is Actor, is called Plaintife or Demaundant: In Criminall (if there bee an Actor) hee is sayde properly cyther to Accuse or to Enfourme. For all proceeding in causes Criminall, is in some of these three sortes: Byther by way of Accusation, by way of Denunciation (which in many poyntes resembleth a Presentment) or by way of Enquirie: to which some doe adde proceeding by way of Exception, proceeding for Notorie of the fact, or proceeding upon the taking in the manner. But I rest in the first three: though they all may aptly be reduced to these two heads, that is, *ex Officio*, or *ad Instantiam partis*: As *Iulius Clarus* doth lib. 5. §. fin. qu. 3.

An Accusation (properly taken) is *delatio alicuius criminis*. A  
prefer-



preferring up of some crime against a man, for to haue him publickly punished, (with a lawfull subscription.) By this subscription the Accuser submitteeth himselfe (in some cases) to be punished by the same penaltie (if he proue not the matter) that the Accused should sustayne being prooued: or at the least, if he fayle (and had no iust ground of his complaint) to incurre the note of *Calumniation*, or (as the woorde is commonly now vsed in *Englande* otherwise then the *Ciull* lawyers *Italians* take it) of *Barrattarie*, that is, malicious bringing of innocent men into danger and trouble; whereby he that so doth, becommeth infamous by lawe. This course is so dangerous in this and some other respectes, that (euen in such Regions where the *Ciull* lawe hath place) it is in many of none, and in others, but of rare vse. For in *Naples* it is forbidden, except it bee for iniurie done to him or his: and in *France* and *Flamden* altogether; and in *Englande* is wholly chaunged into that, which is called *Information*.

L. Libellorum  
& l. 3. C. qui  
accus. non pos-  
sunt.

Clarus ibid.  
& q. 10.

*Denunciation* is of two sortes: eyther by reason of some seuerall duetie, as when a publicke Officer (as *Churchwardens*, and *Synodales testes* (commonly called *Side-men*, and in some places of the Realme *Quest men*) doe by reason of their particular duetie and oathe, make complaynt or presentment) or by occasion of the generall duetie of euery *Christian*. This generall duetie of euery *Christian* produceth eyther *Denunciationem Euangelicam* (such as is spoken of in the eighteenth of *Saint Mattheu*) when as a man both privately, and also before witnesses admonished (yet not amending) is complayned of to the *ordinarie Iudge*: or els bringeth out such complaynt by some credible persons (euen without any admonition) when there be at least vehement presumptions of some crime (that is scandalous to the well disposed) to bee alreadie committed. Which complayntes, whether made by some *Publicke officer*, or by way of *Euangelicall denunciation*, or by credible persons, that doe it in discharge of their duetie *per clamoralem insinuationem delictam ad aures Iudicis ob scandalum ortum*, are none of them (properly or vsually) tearmed *Presentments*: and yet are sometime lawfull occasions (like as the other *solemne Presentment* also is, by *Churchwardens* and *Quest men*) to ground the Iudges proceeding vpon, without any partie, as shall appeare (God willing) in the next place, where proceeding without *Accusation* or such *formall Presentment* shall bee discussed. Yet this way by *Denunciation* is no seuerall course of it selfe, but is ioyned, and is coincident with

enquirie



*enquie ex officio.*

*Enquie particular against some certaine person* (whereof we onely treat in this place) is made, eyther when there is (in some sorte) a partie besides the Iudge, albeit the proceeding bee tearmed *ex officio*: or when there is simply no partie besides him, against the partie conuicted. The first of these is also of two sortes: eyther when there is a partie that *voluntarily* prosecutes and sollicites the Office throughout, which is called *Officium promotum*: or when such a *Prosecutor* doeth in some part excite, and stirre vp the Office to due iustice, albeit not so thoroughly, and in euery part of the suite, as the former, which is tearmed *Officium mixtum*. *Officium Promotum* is of two sortes: eyther when a man *voluntarily* offereth him selfe to prosecute, who is called *Voluntarius Promotor officij*: or when the Court assigneth a man to sollicite the office, and he is tearmed *Necessarius promotor officij*. But when no such partie at all doeth stirre in it, but the *Iudge onely* (for the duetie that hee oweth to the Common wealth, and to see sinne and disorder punished) doeth proceede against any: then is it (by the *Canon Lawe*) tearmed *Officium merum*, or *Officium simply*, without further addition: which by the *Ciwill Lawe* is tearmed *Nobile Iudicis officium*: as of more worth and dignitie, then the other course, that is by a partie and at his petition or instance, which therefore (by a more base appellation) is tearmed *Officium Iudicis Mercenarium, quia quasi de seruit alterius petitioni*, as dealing but at another mans becke. Yet that *Nobile officium* is that, which is so much impugned and exclaymed of by sundry, who perhappes are not so fally and truly enfourmed thereof, as they might be.

Nowe it followeth to shewe (so neere as I can) what course of dealing against crimes and offences is holden both in the court of Ecclesiasticall commission (which of the two is the more egerly impugned) and in *ordinarie courts Ecclesiasticall*, at least so farre as by law is warrantable, if an appellation be brought.

The matters handled in the *Commission Ecclesiasticall*, are such *crimes Ecclesiasticall* as are spoken of in the first treatise: being aggravated (about the ordinarie course of them) by some circumstance of moment. Also these besides: attaching, and conuicting of *lesuites*, *Seminarie priests* & *recusants of both sorts*, execution and punishment of the breach of certaine statutes, as touching her *Majesties* lawfull *superioritie Ecclesiast.* yeilded vnto her highnes by Parliamēt the statute for *uniformitie of common praiers*, & the statute for *reforme certaine disorders*

1. & 5. Eliz.

1. Eliz. cap. 2.

13. El. cap. 12.



in the Ministers of the Church: punishing of Libellers, slanderous reports, and disorderd preaching against persons and matters Ecclesiasticall, by lawe established: misdemeanors about mariages: conuenticles, tending to schisme: Abuse and contempt to Ministers: excessive vsuries, simonies, incests, adulteries and other foule incontinencies, subornations of periuuries in matters Ecclesiasticall, and such like: when (either by reason of the power of the delinquents, or through some materiall circumstance) they be not so readily reformatable, by ordinarie iurisdiction.

These matters are brought thither, when Ordinaries be noted of negligence in giuing redresse: or when they desire aide, either for the greatnes of the partie, whome poore men dare not present, or for the delinquents often remoouing from one Diocesse to another, or for the dwelling of the witnesses else where, or for the offenders frequent, friuolous, and chargeable appeales, or for such like considerable occasion: or vpon credible information made by some great personage, or of some that be in that Commission, or being referred from her Maiestie, or from the Lordes of the Counsell: or vpon complaint of some partie iustly grieued, otherwise being without remedie: or by complaint of a whole Parish, or of a great part thereof: or vpon frequent relation of sundrie credible persons taking offence and griefe thereat, (and setting downe particular euidence of the fact) or in aide and assistance of ordinarie Iurisdiction: as when the delinquent hath no certeine place of abode: or lastly by some *notorie* of the facte, as by the parties knowne hand writing: or for a matter done in great assemblie of people.

Hereupon articles be framed, wherein are contained the place, time, and oftentimes the persons able to testifie and informe further, and all such other circumstances and *Iudicia*, (which I interprete as the worde is commonly vsed) *Euidentes*, tending to the plainer manifestation of the crime. The articles are perused and allowed to be such, as be incident to the conisance of that Court, and containing sufficient detection to open a way to proceed (by way of further enquire *ex officio*, into that crime) by those three Commissioners at the least, (whereof one is of the *Quorum*) that doe subscribe the proceffe, for conuening of the partie. This proceffe is either by way of citation (commonly there called letters missiue) or by way of attachment, when the partie is fugitiue, or flitting, or the crimes be grievous and publikely offensiue, so that it may probably be feared, he will lurke or steppe out of the way for a time. But in both cour-



fea, some one is bound to the Queenes Maiestie to prosecute, and to furnish the Court with witnesses for prooffe of the matter, not to compound it priuately, and to pay charges vnto the partie, if it shall appeare he hath bene (without iust cause or wrongfully), troubled. Yet where the Commissioners themselves are sufficiently enformed *Indicijs*, viz. with *euident matter* against the partie, and where no such prosecutor or *relator* doeth offer to followe it, (so that the Court it selfe takes chiefe care of the prosecution), in some like fewe cases, such bond is omitted.

Nowe when as the partie appeareth (for such iust considerations as hereafter are debated and prooued lawfull) he is to take oath to answer the *Articles* or *Interrogatories* truly, (being matters of his owne facte and knowledge, so farre forth as by lawe he is bound), before euery particular thereof be made knowne vnto him, least after perusal (afore his oath taken) he be drawne by counsell to answer cautelously, indirectly, or wholly to refuse to make answer: perhaps, because he feest they touch him ouer needely, and would coniecture by whome they may be, or cannot be prooued. But after the oath is taken (in setting downe his answer) he may consider as aduisedly, and deliberate for so long time, as in any reason may be desired. And thus farre forth the partie conuented, is (without any partie at all) proceeded with, but *ex officio Iudicium nobili vel mero*: to the intent, he may not bee priuiledged to say that he is not bounde to answer, being at the suite of the office, and dutie of the Iudge (for the publike interest of the Church and Common-weale) as perhaps hee might, if it were at first preferred and prosecuted by a partie. But after he hath perfectly answered them (for the most part) a partie is made, who (if sufficient matter bee not confessed thereupon to proceede vnto a iudgement, vpon bill and answer) doeth take vpon him to prooue it by witnesses, and then *Interrogatories*, *exceptions against witnesses*, and other *defenses*, (for the conuented partie) are vsed almost wholly, as in *Ordinarie Courtes*. By which making of a partie, that which was *merum officium* afore, doeth afterwarde become *officium mixtum*, viz. *ex mero & promote*.

When the matter commes to finall iudgement, if the partie be conuicted, he is punished either by *open penance*, (for his reformation, and for satisfaction of the Church offended) or by *imprisonment*, *fine*, or *censures* of the Church, or by so many of them, as is thought fittest, or by him or others most feared, or to be most conuenient, weighing.



weighing the qualitie of the person, and the office, together with the circumstances thereof.

In *ordinarie Jurisdiction*, crimes be usually proceeded against either *ex officio promoto*, that is, at the instance and petition of some, that will voluntarily shew up and sollicite the office, viz. the Judge vnto his dutie: or else *ex officio Iudicis mero*. In the first of these, albeit the partie conuicted is bound to answer matters by oath (if it be required) so they be not principally and directly of the very crime objected: yet the rule is, that herein he is not bound to answer (vpon oath) touching the very crime it selfe, whether a fame doe runne thereupon, or none at all.

But when an *Ordinarie* proceedeth against a crime, without a partie promouent, viz. *ex officio mero*: then his proceeding must be grounded either vpon a presentment of a fame, or of the crime (made by such as bee specially deputed thereunto, as Churchwardens, &c.) or else vpon *notorietie of the facts*, speeches and information (of credible persons touching such fame or scandale thereupon risen) brought often vnto their eares (which is called *clamosa insinatio*) or by some other course allowed by lawe to be sufficient, to open a way vnto such proceeding. If it be vpon a perfite presentment of the crime or fame thereof, the Iudge may safely without doubt of nullitie or grievance in that behalfe proceede *ex officio*: and so may vrge the partie presented to answer vpon his oath, touching the very crime it selfe. But if there be no such presentment, but *clamosa insinatio delata ad aures suas*, or some equivalent matter, whereby the partie becommes offensive, (though no man will prosecute or present him) yet the Iudge may and ought *ex officio* of verie dutie, to proceede vnto the examination of neighbours thereabouts, touching such fame or crime: which fame if it shall be by such enquire founde and prooued, then he may proceede as afore. But if vpon such denunciation and notification had from credible persons, and the crime being not declared to be *notorious*, nor none *infamie* or *scandall* prooued or presented, he shall neuerthelessse proceede, and vrge the partie to answer the crime vpon his oath: this (of it selfe) shall make none error or nullitie in the proceeding. For if the partie conuicted shall make none opposition (as by saying that he is not presented, nor yet defamed of it, but be contented to answer) then the processe shall stande sounde. But if the partie taking cause of grievance shall appeale from such proceeding, then the *Ordinarie* must be able before the Iudge of the ap-



peale (by the Actes) to iustifie at least the same either by some presentment thereof made, or by the notoriety of the facte, or by infamie, or else scandal founde by way of enquiry, or by some such other denunciation, sufficient Iudicia and evidences (founde afore) as the lawe doeth allowe, to open a way vnto him, to proceede by enquiry *ex officio*. For (otherwise) the Iudge *A quo* (beeing made partie in the seconde instance) shall be adiudged to haue done him a grieuance, to haue his proceedings herein reuerfed, and to pay charges to the partie appellante.

These be the courses of proceeding (in this behalfe) of both the sayde Ecclesiasticall Courtes within this Realme: which in the Treatise following (for those aforesayde principall pointes challenged) remaine nowe to be iustified: and shall hereafter (if neede require) bee shewed to holde a more stricte and exact course in many pointes, then not onely Courtes Ecclesiasticall, but euen Ciuill, (or as wee heere speake) Temporall Courtes (on the other side the Sea,) vsually doe obserue: or then (by the Canon or Ciuill lawes) were needefull, if it were so thought expedient.

### CHAP. 3.

*That proceeding to Enquiry against faults, without either information by bill, or inditement, (which respectiue do resemble Accusation and Presentment in Courts Ecclesiasticall) are both allowed, and in good equitie are sometimes used in the course of Temporall proceedings in this Realme.*



THE first of these opinions that commes to be discussed, is this: that by the lawes of the Realme an Ecclesiasticall Court may not proceede without accusation or presentment. In handling whereof, (leauing the aduantage afore noted in the first Chapter of this seconde part, which vpon the wordes might bee taken,) I purpose (God willing) to shewe, that to proceede in a crime Ecclesiasticall, without eyther partye or presentment, is not simply condemned by the lawes of the Realme: Next, that in some cases, it is not disallowed by the Canon or by the Ciuill lawes: and thirdly, that it is not condemned by the worde of God.



For the groundworke & foundation of this treatise (as in the former) so here I take those words of *Magna charta*, where it is confirmed, that for evermore the church of England shall be free, and shall have *cap. 1.* all her whole rights and liberties inviolable, which is the first confirmation, before any grant be made vnto the rest of the realme: and was done at such time when as (through generall ignorance) it was vnto- truly holden, that the Ecclesiasticall state signified there by the Church of England, had not their *iurisdiction* from the Prince, but immediately from God by the meanes of the Pope: and therefore that their courts and lawes by them vsed therein, were not (in any respect) to be accounted for the kings lawes. Now that this course of proceeding is a right and liberty of this Church, may appeare by the continuall course of all Courts Ecclesiasticall, since and afore that time mentioned in the acts thereof.

But it may happely be said, that such Canon is reuerſed by a later *25. H. 8. cap. 19* statute, as being contrariant or repugnant to the lawes, statutes, and customs of the realme. Here I am to put you in minde once for all, that by the words contrariant or repugnant (by the very rules of reason) can not be meant any thing which is onely diuers, as an house is from a man (and yet no contrariety or repugnancy betwixt them: for then euery diuersity, as reading the sentence *De scripto*, not vsed at the Common law, should be within this compasse) Neither by this contrariety and repugnancy (like as common vse of the word doth teach vs) is signified any of the three other sortes, but onely the *contradictorie opposition*; as when that which is affirmed by the one law, is directly gainesaid or contradicted by the other law: in which case (by this statute) all such Ecclesiasticall law is reuerſed. As for example, the Canon law holdeth, that a plea of *Aduowſon*, or for right of Patronage, ought to be of Ecclesiasticall conuſance, and that to sell an *Aduowſon* otherwise then with the whole manour, to which it is appendant (for they acknowledge none *Aduowſon in groſſe*) is *Simonie*: both which caſes (because by the lawes of the realme they be contradicted) are therefore of no force heere, in any Court Ecclesiasticall.

But I hope to shew, that proceeding against a crime without either partie accusing, or such *solemnus presentment* (by ſworne officers purposely deputed as is meant) not onely is not gainſaid by the lawes of the realme, but the like (thereby) in sundry caſes practiſed. As putting in an *information by bill* against a man at the Common law, doth anſwere to *accuſation* or *promoting a matter* at the Ecclesiasticall:



So doeth *indictment* answer and is equivalent to such *presentment*. But a man (without either of them) may be brought into question or *inquire*, may be attached or imprisoned, and therefore by the practise of the lawes of the Realme, this may happen, whereof we here argue.

1. Eliz. cap. 1.

This doth appeare by that statute where it is enacted: that if a man be in prison for supposed speaking in behalfe of forren supremacy, and happen not to be indicted within one halfe yeere of the offence committed, that then he shalbe set at libertie: so that it may happen a man to be in question, to be proceeded with, and to be in prison also, without either of those rehearsed.

1. Eliz. cap. 2.

The statute for *Uniformitie of Common prayer*, maketh three meanes of conviction by the course of the Common law, *vz.* verdict of twelve men, the parties confession, and the notorious evidence of the fact. If the notorious evidence of the fact (at that law) may serue for a conviction, may it not likewise without partie or *presentment* serue in an Ecclesiasticall court to ground the Iudges proceeding vpon, being another meane (appointed by that law for this purpose) besides *accusation* and *presentment*, as shall appeare in his due place? By that statute it is further provided, in the very point in handling, that *Ordinarie*s not onely at any other time and place then at their *visitations* and *synods*, may take *accusations* and *informations* (a word of larger signification then *presentment*) but may also enquire elsewhere within their *iurisdiction*, which is to do it *ex officio*, and that without either *accusation* or *presentment*: how farre? In like forme as heeretofore hath bene used in like cases by the *Queenes Ecclesiasticall lawes*. Which last clause can not be restrained to the maner of *censures* onely, but to the authorising (by way of reference) of all such proceeding in that *proviso* mentioned. So that, if the lawes Ecclesiasticall shalbe shewed to warrant it, the lawes of the land (in this behalfe) will auow it.

*Ibid.* ad finem.

This course is many times very vsuall and agreeing both with law, equity, and good discretion. Do not the *Iudges* of the land, and *Iustices* of peace sometimes vpon their owne discretions, and sometimes vpon sundry (perhaps secret) yet credible informations of such (as yet would be vnwilling publikely to accuse, or to preferre *indictment*) call men into question, & often times imprison them, till they finde surety for the peace, yea and sometimes also for their good abearing? And doth not this often fall out vpon secret complaints to the *L. chancellor*, and other like great officers touching the oppression, ill demeanor, and violence of some great and potent man in a countrey,



tre, whom the meaner sort dare not publikly deale against? and is not such a person (sometime without any accusation, endictment, or presentment openly preferred) most iustly put out of all commissions in his countrey, to his further disgrace and griefe?

And do not the lords of the councell also most honourably oftentimes call such into question afore them, as be vehemently suspected to be great malefactours, and deteine them till they haue sufficientlie cleared themselues; albeit no such *accuser* or *solemne presenter* bound thereunto by any peculiar *office*, do appeare or shew himselfe? Whereby, and by many such like we may see, both the vse and the equitie of such proceedings, as necessarie occasions are offered.

Against this, are these words of *Magna charta*, by some obiected: *Magna chart. v7. No bailife from hencefoorth shall put any man to his open law, nor to an oath upon his owne bare saying, without faithfull witnesses brought in for the same.* These words (I must confesse), are something obscure and darke for me to vnderstand, what is positiuely meant by them: because I know not the vsage afore that time, which was meant hereby to be remedied. And they seeme the rather strange, for that I can not see what probable colour (afore that time) might be for a defendants oath in a matter where two faithfull witnesses might be vsed.

Howsoeuer it be to be vnderstood, it is easie enough to iudge, what can not be vnderstood by it. First, it can not be any way extended to the proceedings Ecclesiasticall: for all in that statute (after the confirmation of the *Churches liberties*) are referred to courts and matters Temporall: betweene which and Ecclesiasticall (as is touched afore) there was (in those times, and long after) made a plaine severance and distinction, for the ground of their seuerall authorities and iurisdctions, so that the one was called the *Kinges Court*; the other a *Court Christian*: And for that it speaketh of a *bailife* onely, which must needs be vnderstood of some officer of a Temporall Court.

Againe, those words are not appliable to the matter that we handle: for albeit it could be truely said, that by a *Bailife* an *Ordinarie* might be vnderstood: yet it is not holden by law Ecclesiasticall, that vpon the *Ordinaries bare saying*, any man might be put to an oath: because there must be some further matter of *evidence* to open a way to such *enquirie*. Furthermore, these words can no way helpe this matter; for thereby is implied (if I conceiue aright) that vpon a *Bailiffes*



*Bailiffes bare saying* a man may still be put to his open law, or to an oath, so that he be able thereupon to bring in faithfull witnesses: and then will it follow, that so an *Ordinarie* haue witnesses, there shall need neither party to accuse, nor such presentment, which buildeth vp for vs, and doth not destroy the issue in handling.

25.H.8.ca.14.

Another obiection is taken out of the *preamble* of the repealed statute for *heresie*, made in the time of the famous king *Henrie* the eight: the wordes are these: *vz. It standeth not with the right order of iustice, nor good equitie, that any person should be conuict and put to the losse of his life, good name, or goods; unlesse it were by due accusation and witnesse, or by presentment, verdict, confession, or processe of outlawrie.* Which words (you see) doe speake of conuiction, and of being put to losse of one of those three, and not of the calling into question and maner of proceeding: which doth appeare, in that to the word *Accusation* is ioyned *Witnesse*, with a copulatiue: whereas this very opinion (whereof we treat) implieth, that either vpon any accusation or yet vpon presentment (without any more adoe) an *Ordinary* may ground his further proceeding. Albeit (as we all say) a man may not be conuicted in a Court Ecclesiasticall, either vpon a bare accusation or presentment without witnesse, or confession: to which (I thinke) may well be added, wilfull contumacie, and not presumed onely, which both in Ecclesiasticall Courts, and some others of this realme, amounteth to as much (in construction of law) as a confession: and in such Courts it hath a correspondence vnto an outlawrie, that is a conuiction onely vpon presumed wilfulnesse, at the Common law.

Moreouer this *preamble* doth not here rest in the two words of accusation or presentment, being the onely things required (by this opinion) to warrant proceeding Ecclesiasticall; but addeth also witnesse, verdict, confession, or processe of outlawrie: and therefore can not (by any meanes) be referred vnto enducements, to ground proceedings vpon, but onely vnto meanes of conuiction: for in that whole sentence, no verbe passiue is vsed, but conuicting and putting to losse, &c. which maketh me the more to maruell, how the word presentment, with a disiunctiue, came in amongst the rest: as if by a presentment alone, a man might be conuicted, or put to losse of any of these three.

Ibidem.

Some other wordes following in the same *preamble*, are also brought for this purpose, *vz. wherefore it is not reasonable, that any Ordinarie, by any suspicion conceined of his owne fantasie, without due accusation*



accusation or presentment, should put any subject of this Realme, in the infamie and staunder of heresie, to the perill of losse of life, losse of name and goods. These wordes are inferred vpon the former, and are directed vnto none other crime but *Heresie*, where the peril and penaltie is so grieuous, as losse of life, losse of name and goods, ioynthly together, and therefore can by no reason be drawen & stretched vnto euery other crime Ecclesiast. where no such peril of penaltie, or of punishment resteth. For wordes of statutes are of strict interpretation, and are most strict in matters penall: and therefore may not bee extended vnto other crimes then are expressly mentioned, though there were (in both) a like reason: Whereas (in truth) betwixt the punishment of *Heresie*, *Atheisme* or *Apostacie*, and other crimes Ecclesiasticall, there is as great dissimilitude as may be. For death in these is not inflicted, but when all hope of amendment and reformation of the partie himselfe is past, and he is therefore taken away by death, to the intent both others may be terrified by the example, and that hee haue none opportunitie to entise others to heresies, which is to be a traitor vnto God. But in the correcting of all other crimes Ecclesiasticall (though secondarily some times the terrour of others is sought) yet principally the parties owne reformation, and bringing vnto penitency & amendment, is intended. For hereby he sustameth no losse at al, not so much as of his good name, but rather a gaine, because after his reformation & repentance, he ought to be (of all *Christians*) holden as deare and precious in Gods sight, as if by falling into the sinne, his credit had neuer ben impayred. In which respect those *Canonick penances* were by the fathers of the Church, & by y<sup>e</sup> oldest and purest *Canons* said to be *medicina anime, non pœna*: yet not as *satisfactory* for the sinne, but as good inducements vnto, & also testimonies of repentance: and you know, how absurd a kinde of reasoning it is, either to argue from one thing to another *à dissimilibus*: or to reason frō that which is more likely to be, vnto that which is much lesse likely (vz. *à maiori ad minus*) affirmatiuely. Furthermore in these last recited wordes there lyeth a plaine opposition, betwixt *any suspicion conceived of the Ordinaries owne fantasie*: and *a due accusation or Presentment*. Therefore, if found and credible information, notice or euidence may appeare to be brought vnto him, so that hee cannot be saide onely *suspiciously* to concerne it of his owne fantasie, the true intent hereof, is thereby satisfied.

Lastly, heere seemeth *a due accusation* or els *a due Presentment* of *Heresy*, in reason and equitie to be required: but it is not here, neither



(as I take it) elsewhere by the lawes of the Realme determined, what may be accounted a *due accusation* or a *due presentment* of a crime in an Ecclesiastical Court. Then (as I construe the lawe) must it be left vnto the lawe Ecclesiasticall to determine, when these may be saide to be *duely* done.

If therefore it may be shewed (as I trust it will) that not onely a *Presentment* vpon oath, by *Officers* specially thereunto appointed, shall by the lawe both Ecclesiasticall, and also Ciuill, (which is as a kinde of Common lawe, of most forreine nations) be deemed a *due Presentment*, *Denuntiation*, or *detection*, sufficient for the Iudge by either of those lawes, to grounde an Enquirie and proceeding *ex officio* vpon: then cannot these wordes of the preamble not so much as in proceeding against the crime of *Heresie* exact (of necessitie) such a *solemne presentment*: and much lesse in any other crimes that are neither there mentioned nor meant. And so we may conclude, that to proceede in an Ecclesiasticall Court against a crime, otherwise then either by a *Partie* or such *Presentment*, is not contrarie or repugnant vnto the lawes of the Realme, but rather the like course thereby often practised.

## CHAP. 4.

That by the Canon and Ciuill lawes, sundry other inducements are allowed for a Iudge to ground an Inquirie of Office vpon, besides Accusations and Presentment by Officers specially thereunto appointed.



Shewing that by the lawes Canon & Ciuill, there be many other meanes besides *accusation* or *presentment*, to open a way to a Iudge for *enquirie* of a crime: I will ioyn both those lawes in one Treatise, because they doe iumpe for the most part together in this behalfe: and that the lesse cauil, against the equitie of either, may be taken: when it shall appeare that the Temporall or Ciuill Courts, of all other ciuill nations, doe vse the like groundes for proceeding by *Enquirie ex officio*. Because the *solemne manner of accusation brought in by the olde Ciuill lawe of the Romanes*, is now growen cleere in disuse: therefore proceeding to *enquirie*, vpon the *diffamation of the partie*, doeth succede in steede of *accusation*, as the common opinion is, of the writers in those lawes. The reason

Iul. Clarus li.  
5. § fin. qu. 10.

Card. Alexan.  
in c. de accus.  
col. 14.



of this is, because the very people amongst whome such fame flieth, doe seeme (thereby) in some sorte to preferre a kind of accusation against him. Therefore is fame described by Tully, to be the testimonie of a multitude. And albeit Plutarch doe report that this was a common proverbe: πολλοὶ καὶ ἀπρόσσωτοι πολλὰ τὰ κατὰ βίαν, in warre and in heare say, be alwaies many vaine and untrue matters: yet the olde Heathen Poets in an admiration of fame, doe attribute a kinde of diuine qualitie and eternitie vnto it.

Hesiodus.

*Fame* (saith he) being a thing which many people bruite abroad, doeth neuer altogether come to nothing, for shee is of a certeine diuine nature. The proper effect of fame, is shewed by olde Grammarians which write of difference of wordes that be of neere signification. *Opinio ostendit, Fama indicat, rumor tumultuatur.* The opinion or weening of men giues an inckling, fame giues an euidence, and a rumour tosseth all vp and downe.

Corn. Fronto. Grammat. in differentijs.

Some Diuines coulde say, that a publike diffamation concerning any thing (like as also the Notorious euidence of a facte) doe stande in steade of an accusation and thereto apply that in the Scriptures (seruing as it were to make way to a further enquire and examination by God) where the blood of Abel is saide to crie out against his brother that had murdered him. Gen. 4. Therefore if an euill fame of a man (called by diuerse writers *publica infamia*, and by others *diffamatio*) doe founde in place of an Accusation, then is it of the like effect, and yet not the same with the thing, in whose place it succeedeth. Neither can it be a solemne Presentment, although sometime it fall out so to be presented: because any two witnesses whosoener doe suffice to prooue such a fame, albeit they be not such, as by any peculiar duetie or office stande charged, to make such presentments.

Clarus ibid. qu. 6.

Nowe when as neither Accusation, nor solemne Presentment, nor any of those other meanes (hereafter noted as sufficient to ground a Judges Enquire *ex officio* vpon) doe happen in a case, then the rule of the lawe is, that such publike infamie must appeare and be produced, before the Enquire may bee undertaken. Neuerthelasse, this rule (as almost all others) hath by those lawes, certeine exceptions. First, it hath no place in the crime of heresie: because here in (for the enormitie of the crime) a vehement suspicion sufficeth to make such enquire: and this is commonly holden by the lawyers. Yet it is limited by some, that there ought at least some *Capula*

Felyn. in c. qualiter &amp; quando el. 2. de accusat. Clarus ibid.



Baldus in l.  
nullus nu. i. C.  
ad legem iul.  
Maiest. & iun.  
in c. cum o-  
porteat. nu. 5.  
de accusat.

Abb. in c. i. de  
offic. Ordin.

Aret. in c. qua-  
liter el. i. de  
accusat. & Fol.  
Prat. Cri. fol.  
102.

Clarus ibid.  
qu. 6.

Clarus ibid.  
qu. 20.

*Notification, Denunciation or credible relation* bee afore made as in other causes, lest too great scope be giuen vnto Iudges for framing of such enquiries. Secondly, that rule hath no place, when enquiries *ex officio* bee framed eyther by commaundement or by knowledge of the Prince himselfe: so they bee obtained *motu proprio*, and not at the prosecution of any partie prinatly interested. Which exception alone, it there were nothing els, will sufficiently cleare the Commissioners Ecclesiast. for their proceedings in this behalfe. Thirdly, the saide rule faileth, when the enquire is made not to the effect of punishing, but to the effect of correcting or refovrning the partie for his soules health. For in this case, enquire may be made *ex officio*, though no fame be precedent. And albeit the punishments corporall of olde time vsually inflicted by Ordinaries vpon delinquents (as *trium fustigationum tribus quibusque proximis festis diebus in Ecclesia*) bee now ceased in this Realme, so that the penances are not Corporall, but Canonically, onely tending wholly to driue them to repentance, whereof the Church may beare witnesse which was afore offended: yet (I doe take it) that euen this libertie giuen vnto them by Law of proceeding without a fame proued, is not vsed in the Ordinarie courtes of this Realme. Lastly, if an Ordinarie shall proceede to enquire *ex officio*, without publike infamie precedent, or yet any other matter (in Lawe sufficient) to ground it on, yet if the partie shall object nothing against it, as that hee is not infamed thereof &c. then (by common opinion of writers) the Processe shall be of validitie, and not be auoyded for a Nullitie vpon this poyn.

But this whole course of grouding Enquiries vpon the publike infamie of the partie, is by generall custome of other nations in both courtes long agoe quite disused, not onely in these excepted cases, but in all others also whatsoever, so they haue eyther euidence (tearmed *Indicia*) Complaynt by a partie griued, Denunciation, or some other matter equivalent vnto these to founde it on. Secondly, *Indicia* (as I doe interprete them) Euidences or Probabilities, are likewise sufficient causes to ground an inquiry *ex officio* vpon. These be of three sortes in Lawe: the first are such as be called *Leuia Indicia*, light probabilities or suspicions. But this kinde albeit for two purposes they may serue, that is, for the attaching of the party (least hee flye) by such Courtes as hath this authoritie, or for the taking of further informations in the matter: yet are they no sufficient grounds alone of theselues, to make such enquiry. The second sort are stronger presumptions or arguments, most properly and vsually termed by the general name of *Indicia*, but are of lesse force then that, which the



the lawiers *al probatio semiplena*: & these alone be sufficient for the grounding of such enquiry. The third sort are most weighty & pregnant evidences, called *Indicia indubitata*, & are such (especially in hidden crimes, secret treaties, & all such crimes as be of difficult proofe in their owne nature) as whereupon not onely a *Processe of inquiry*, but a condemnation of the party may also be grounded, as is commonly holden by writers: yet because in *Capitall* crimes the law saith that proofes ought to be cleerer then the noone day, the temper vsed in such countries where the maner of penalties be wholly arbitrary to the Iudges, is to be liked. For in this case for y<sup>e</sup> most part they spare the paines of death, (being otherwise the ordinary punishment for such offence) and doe change it into some other corporall punishment, as *condemnation to the Gallies, Fustigation, Strapada*, or such like: & this is vsually practised, vpon condemnations that are grounded only vpon violent presumptions, hauing neither confession of the party, nor witnesses.

But in the second sort of these *Indicia* or *Evidences* being lesse then halfe proofes, if two or moe of them fall out in one matter, so that both of them be in his owne nature perfite (as for examples sake a fame duely proued, and one witnesse without exception) they may not be ioyned together, to a mans condemnation, if the proceedings doe aime at a corporall punishment: but (to condemne a man in a pecuniary mulct or fine, they may be layde together, so that there concurre also herewith some other coniectures and enducements, as is holden by common opinion of writers in the Ciuill lawe. Neuerthelesse, if the Prince or his chiefe C<sup>ounsell</sup> were to decide such a cause vpon no such seuerall *Indicia* or great presumptions: it is holden, that then they may be ioyned together euen to y<sup>e</sup> intent of condemnation vnto a corporall punishment, yet extraordinary: that is, some lesse punishment then is due by law for such a crime, if the partie had bene conuicted vpon confession or witnesses, and not alone by *vehement presumptions*.

Now when any one *Iudicium* or *Evidence* of the third or of the second sort falleth out against a man, so that it is set downe in y<sup>e</sup> Acts, as happily comming to light vpon some generall enquiry made against crimes, where no singular person at the first is thought vpon: thereupon the person detected (without any further speciall enquiry of the certaintie of such detection) may be attached by Courtes thereunto authorised or cited, as shall be thought requisite, and may be proceeded against, by way of enquiry *ex officio Iudicis*.

Practica Car.  
fol. 72.

Gramaticus  
decif. 41.

Clarus ibid.  
qu. 63.

Crotus tract.  
de testibus.  
nu 102. gl. in  
c. Veniens  
cl. 1. de testib.

Dec: conf.  
210. in fine.  
Marfil. in l. de  
minore

rimum ff. de  
questionibus.  
Gramaticus  
Decif. 11. &  
Clarus q. 63.  
ibidem.

Clarus ibi-  
dem. q. 5.



Angelus de  
males. ve. Fam.  
publica. nu. 9.  
Pract. Casoni.  
fol. 14. nu. 2.

Bart. in l. con-  
gruit ff. de  
Offic. Prae-  
sidis.  
Salicet. in l.  
ca quidem C.  
de accusatio-  
nibus.  
Ferretus  
confill. 31.  
nu. 11.

Salycetus. in  
l. finali. C. de  
quest.

Clarus ibi.  
dem. qu. 11.

Clarus. ibi.  
dem. qu. 10.

If here it be asked, what certain rule may be given for the exact knowledge & distinction of these, one from another? It is answered, that this whole matter Indiciorum (of Evidences) must be left to the arbitrary judgement of an upright & sincere man, such as Judges are presumed to be. That be, according to the quality of the person, crime, & manner of the suspicious and presumptions, may judge what is a sufficient Indiciu or Evidence to ground proceeding of Office vpon: and so is it commonly determined by the writers. For Indiciu sufficiens aequiparatur fame. A sufficient evidence or presumption is equivalent unto a fame to ground a Judges proceeding of Office vpon.

To make Enquire saith a Lawier, that is, to receiue informations touching a crime, any probable suspicion sufficeth, by the which the Iudge may in reason be induced to beleue, that the crime was committed by such an one. Neither is it necessary by lawe (as it is commonly holden, howsoever some haue disputed otherwise) that the partie should be called to the taking of such informations by the Iudge, least thereby he might take warning to flye or to lurke. Therefore another great Civilian setteth downe the whole practise of courts abroad in this criminall poynt, with the reason of it, thus: Those Judges (saith he) that be well advised, before the very actian of enquiry of Office, doe take information from the witnesses, and setts them downe in writing, least (happely by subornation or other sinister practise) they afterward say the contrary: and then framing the enquiry, if the punishment (by lawe to bee inflicted for such crime) be corporall, they cite the defendant not verbally but really, (that is, by attachment) lest hee flie vpon it: and after they make him to answer to the enquiry: which if he shall denie, then againe they examine the witnesses, and at that time they call him, to see them take their oath.

To like effect, another reporteth that in sundrie provinces the custome is to examine witnesses for the information of the Court before the defendant be cited, to this purpose, that they may proceede to his attachment or citation: but if the defendant being called, shall contumaciously absent himselfe, these witnesses may be of sufficient force to proceede, euen to definitive sentence. This (saith he) is done vpon a notable reason, lest if the defendant knewe the evidence to be given aforehand, he might either flie away, or more easily suborne or corrupt such witnesses, as were to be examined.

The next cause that openeth way to Enquiry of a crime, is a complaint preferred vpon by some partie grieved. For so it is reported, that such complaint groundeth a Judges enquiry (of office) sufficiently. Yea and those things that seeme to be required further thereto,



are sayde (by generall custome of the world) to bee abrogate: and so the Iudges proceeding ex officio, supplieth all such defects.

The fourth thing besides, that openeth way to such enquiry, is Denunciation: which, though in an Officer thereunto purposely deputed, it bee termed a *Presentment*, yet being related to the Iudge by another, it cannot be so called. Neuerthelesse it is the common custome (saith a Civilian writer) that not onely Officers thereunto deputed may denounce, that is, preferre or relate crimes, but also any other may. So is it affirmed by others: for in any crime in which the Iudge may proceed of office, whether by law or by custome, every man is admitted to be a Denouncer, whether hee doe it of his owne motion, or by necessity of his Office. This course of proceeding by Denunciation, is in deede no severall course from proceeding by Enquiry: for it doth worke nothing farther, but commeth in place of the Defamation or publike fame, or of a Complaint, and thereby openeth a way to Enquiry.

The manner of it is thus: he that Denounceth, doth make knowne to the Iudge in *Actes*, that such a day by such a man, such a misdemeour was committed, and that N. and A. are more sufficiently instructed in the matter. Neither is he bound to deale any further in it, but so to leave it unto the Iudge, and this is the custome herein. And in such crimes as be done by committing some thing, the place must be expressed, but if it be by omitting, the setting downe of the place is not required.

Now when such a complaint or Denunciation is put up, not onely the Iudge may, but he is also bound to proceede to Enquiry: for otherwise, by lawe he is to bee punished. And this immediate proceeding vpon Denunciation is especially observed in these two cases: v. z. In those crimes that rest in the minde only as Heresie and in those, where no trace of the fact do remaine, as in adultery, injurious words, &c. For in both these kinds none other inquiry neede be made, but the Iudge upon the complaint or Denunciation given up, straightway may & ought to proceede by enquiry.

And albeit by the olde lawe of the Romanes, such denouncers were bound to make prooffe of those things that he preferred: yet the generall custome doth not admit hereof. And therefore such as by duty are bound to Present, are not to bee condemned in expenses for Calumniation only presumed: for *presumpta Calumnia* ariseth, if the matters falleth not out to bee proued, that was preferred: but if *Calumniation* in deede called *Vera non presumpta Calumnia* shall appeare, he may not onely bee condemned to the party in expenses, but may more grievously bee punished, as shall seeme good to the Iudge in discretion. Neuerthelesse, hee that willingly becomes a Denouncer or Re-

latur,

Alber. in l. ea  
quidem. nu. 9.  
C. de accusat.

lul. Cl. qu. 7.

Ibidem. p. m. b.

Ibidem. p. m. b.

Ibidem. p. m. b.

Angel. de iur. C.

malificis. Sc. l.

Praet. Contrab.

di. fol. 236. o. g. 13

nu. 21.

Clar. ibi.

dem. qu. 1.

Fert. C. de iur. C.

Baldus in l.

mancipia.

nu. 1.

C. de seru. fugi-

tiu. & Amad.

de Syndic.

nu. 72.

Clar. ibi.

dem. qu. 4.

L. Diuus. & l.

ab accus.

nuntiatores.

ff. ad Iurpi-

lianum.

Angelus. ibid.

Salycetus.

in d. l. ca qui-

dem. nu. 23. &

Marianus in c.

qualiter. nu.

179.

lul. Cl. lib. q. 7



latour, shalbe condemned in expenses, euen for a *Calumination* onely presumed.

Lud. Rom.  
in l. & si  
certus ff. ad  
Syllani, &  
passimalii.  
Bartol. in l.  
supra f.  
de adulteris.  
Clarus. ibi-  
dem. qu. 27.

The fift cause is, when in examination of one offendour, another happeneth by him to be named, as partaker and fellowe in the crime. For it is the common opinion of writers, that this nomination sufficeth for to ground a further inquiry upon, and to take informations thereof. Or albeit the partie be not cited to the taking of such informations. But this appeachment of a partaker in a crime, is not to be bolden as the saying of a witnes, but as the saying of a Denounceur, or Relatour, which may make a way for the Iudge to enquire, as the saying of any other vile and base person might.

Clarus ibi-  
dem. q. 9.

The sixth meane ( besides ) which those lawes mention as sufficient grounds to institute an Enquiry *ex officio* by, is the *Notoriety* of the fact. For this not onely sufficeth for the former purpose, but also worketh so farre, that the Iudge may proceed vnto execution, without further solemnities.

Cynus in  
l. dicta ca qui  
dem. ver. qui  
ergo.

That thing is said to be notorious, that by no colour or wrangling can be concealed, shadowed or excused, as the most writers doe hold. As if a crime be committed before the whole people in a publike assemblie &c. but before the Iudge may so peremptorily in this case proceede

Practica Con-  
rad. fol. 140.

vnto sentence or execution, it is required, that this *Notoriety* be made iudicially to appeare vnto him as to a Iudge, in *Actes* ( vnto the speeding whereof the defendant also must bee called ) and not only by extrajudiciall

Ferri. Confil.  
31. nu. 5. & 35.

informations, giuen vnto him. And thereupon the Iudge must first declare vpon such iudiciall proceeding, the fact to be notorious.

Iul. Clarus.  
ibidem q. 8.

The last of such meanes and lawfull inducements to Enquiry, is *Deprehensio in flagranti crimine*, when the delinquent ( as we speake ) is taken with the maner. For this, as the precedent, is sufficient to open for the Iudge a way to such proceeding. And the same is to be said, when a Iudge himselfe seeth some crime committed. So that by the premises it may appeare, how many other grounds of proceeding by Enquiry be warranted vnto a Iudge both by Canon and Ciuill lawes, and by generall custome of other nations abroad, besides accusation by some party, and presentment by officers specially appoynted, which is the contradictorie of that opinion, against which we haue argued.



## CHAP. 5.

Of the necessary and manifolde vse and equity of proceeding by enquiry of  
office, both in Ecclesiasticall and in Temporall  
courts and matters.



Ow followeth by order to shew that to *enquire* and  
*proceed ex officio* in crimes & offences Ecclesiasticall,  
is lawfull : and so consequently in other causes then  
of matrimony or of testament. To *enquire*, is to receiue Clarus ibid.  
informations and proofs against a man, for some misde- q.11.  
meanor . This is done of office : for all writers do make

*Enquirie* to be the office and duty of the Iudge. The Iudge is said then to Berous in  
do it *ex officio mero*, when of himselfe, and for discharge of his owne dutie, Rubr. de ac-  
he taketh informations and proofs against a supposed delinquent, without cusat. nu. 10.  
the prosecution of any other partie : and then is he said to proceed by way of Clarus ibid.  
*enquiry*, without further addition. This enquiry in the popular Com- q.3.  
mon wealth of Rome, was called *Questio*, and those that did exercise  
it, *Questitores*. In the times of Emperors, the hearing of matters capitall  
was termed *merum imperium* : of priuate matters, *iurisdiction* : hearing  
of both, *mixtum imperium*. Sigo. li. 2. de iudic. c. 4. This might seeme  
(incidentally and by the way) to haue bene sufficiently prooued in the  
two former chapters : in as much as the proceeding by a Iudge with-  
out either *accusation* or party made, or yet any such solemn *present-*  
*ment*, is there also iustified.

But because this maner of proceeding (by some sort of men) is  
greatly exclaimed of, that are not rightly informed in the nature of  
it, or what is meant by it, (of which impugnors some, I thinke, ex-  
claime against it *ex officio mero*, and some *ad instantiam alicuius par-*  
*tis*) it seemeth therefore to require a seuerall handling. Wherein,  
first I will put you in minde of the equity and necessary vse of it, as  
well in the one court as in the other : next, that it is often times men-  
tioned and practised by the temporall state : then, that it is an allow-  
ed proceeding vnto courts Ecclesiasticall by statute and Common  
law, with answer to such obiections as I haue heard made. After-  
ward, I will touch something further of the practise of it, not onely  
by the Canon, but by the Ciuill law also. And lastly, that such course  
is vsed and allowed (by example) in the Scriptures.

The equity and necessary vse of this course to be holden, may be  
shewed by the *partie*, which (by fiction of law) is supposed to be the  
exciter and stirrer vp of a Iudge vnto it, when none other person is  
found that will prosecute. This party I meane, is the publike interest Clarus ibid.  
q.7.

N

which



Practica Mil-  
lei fol. 3. nu. 31

Clarus ibid.  
q. 10.

Decius confi-  
lio 170. nu. 1.

Clarus ibid.  
q. 12.

which the Church or Common wealth haue, to haue crimes punished: *Interest Reipub. prouinciam purgari malis hominibus: & ne maleficia remaneant impunita: pœna enim vnius, terror est multorum. Bonis nocet, qui malis parcat. Sicut est misericordia puniens, sic est crudelitas parcens,* with sundry other like rules of law and Canon. Now the *publike interest* doth not onely rest in this, when some benefite is coming towards the common treasure, but is chiefly shewed by procuring common tranquility and repose of the subiect, with sincerity of religion, and integrity of conuersation: and it was called by the *Romanes* (especially after the popular state was turned into a monarchy) by the name of *Fiscus*: and may well and significantly with vs (in respect of the meaning) be termed, the interest of the crowne and dignity royall, which by all offences are said to be violated. Therefore do the *Ciuiilians* of other nations say, *In quocunque crimine fiscus est accusator*: against euery crime the benefite of the Common wealth is an accuser. And another saith, that in what crime soeuer a Iudge may proceed of office, there *Fiscus*, the common benefite stands in stead of a party. And it is testified to be a common rule, that euen in an offence but against a priuate person principally, the iudge of ten times is of office to proceed to the inflicting of some penalty not expressly set downe in law against such an offence (for so is *pœna extraordinaria*, meant in the Ciuill law) by reason of the very interest the Common wealth hath, to haue misdemeanours punished: in which respect some man that by law may not use action, yet is not forbidden implorare officium Iudicis, to stirre vp the Iudge (by petition) to proceed, for his owne office and duties sake.

If her Maiesties most honourable councell together, and euery one apart: if the *Iudges* of the land, if carefull and vpright gentlemen of the *Commission of peace* in euery countrey, of office and for their dutie sake (for the most part) without any so much as priuate complaint (much lesse professed accuser or party) but perhaps vpon some generall muttering, yea and sometimes without so much, for a care and vpon a feare at large onely conceiued what may happen: did not, or should not enquire, looke into, and take informations of riots, violences, disturbances of peace, conspiracies, felonies, murders, and of all other misdemeanours and outrages, and so seeke further to discover them, and to punish them or bring them to Iustice; might it not iustly be feared, that the realme would much more abound, and ouerflow in all kinde of mischief? Would the *Constables* abroad, *Headboroughs*, *Bursholders*, and such other inferior officers and ministers of themselves preferre such vp, or being brought out and presented



presented by others, would they effectually follow and prosecute them as apperteineth, so that the magistrates need not to take further care? I thinke it will not be so supposed. The like then may be said of Ecclesiasticall officers and offences, notwithstanding all generall inquiries in *Senes or Synods*, and in *visitations*.

But it will perhaps be said, in the one Court they may be presented by the sworne men, and in the other by endictment of the grand iury, at sessions and assises, &c. It is true, they may be; but how many, I pray ye, are so found out, and endicted from time to time by the grand iuries of their owne enquiries and knowledges: if either some party (griued in particular) doe not giue euidence, or the Iudges or Iustices of themselves doe not informe them, and vrge them, notwithstanding the straitnesse of their charge and oath, and that they be taken out of the feuerall parts of euery shire? But be it, that some notorious murderer or felon, is so by them indicted at some times: how many other offenders in penall statutes (being men of any reckoning in the shire) are indicted at all, thorow out the realme, in many yeeres? as recusants in comming to diuine seruice, such as haue and keepe retainers, and giue lueries contrary to statute, onely to band in quarrels, and to mainteine bad actions; or yet such as goe excessiue in apparell, or which violate the statutes appointed for not eating flesh vpon certeine dayes. Nay, it falleth out often times, that the more to giue edge to such Iuries to do their dueties, euidence hath bene giuen vnto them in these offences: yea, such and so good, as vpon lesse euidence they would haue indicted a man of felonie, to the hazzard of his life, so he were but some base fellow. Now, when none almost will be found to giue euidence (sauiug in such a cause where he findes himselfe or some of his pinched) yea, and not in such neither, if the other partie be a man of any tolerable reckoning or ability; and very few (albeit themselves doe perfectly know it, or haue reasonable good euidence giuen against some man of power) that will finde an indictment against such an one, although both he that giueth the euidence secretly, and all the Iury may be in some hope, not to be knowen who did principally stirre in it (because they be sworne to keepe the Queenes counsell, their fellowes, and their owne) can it then with any reason be imagined, that any man almost will be found voluntarily to become an accuser, and to prosecute at his owne costs and charges? Experience teacheth that most men will not, few that dare, and those onely such as take themselves in some particular respect wronged.



We see in a great multitude of penall statutes at the Common law, how men by third parts and moities of forfeitures (besides great priuileges in proceeding) are as it were allured and entised, to informe against offenders: yet very few (notwithstanding such great gaine as thereby might be got) are found (besides such as make an occupation of it) that will voluntarily preferre informations: albeit there be enow that want the money, and could well be content to finger it, out of what malefactors purse soeuer it came.

The reasons of this backwardnesse, I take to be the charge, trouble, common obloquie and offence to them that be prosecuted, and vnto theirs, and thereby feare and perill to come by some further mischief vpon their procurement, or for their fauor. Now, where men that are so well hired, and (by reason the Queene is a party to such informations) so fully in all reason protected, will not, lust not, or dare not preferre matter penall against others: shall we looke for better courage to be shewed by priuate persons, against offenders in Ecclesiasticall crimes, where they can expect no such countenance nor remuneration to lighten the other burdens and dangers? and therefore either *of office* to be prosecuted, or must be wholly left unpunished.

In riots committed and done vpon others, we see iust cause of griefe for the iniury receiued: and thereby occasion giuen to seeke lawfull reuenge. There was good remedy also provided for them at the Common law. Yet in the time of king *Henrie* the seuenth, for a further remedy & repressing of them by the lords of the Star chamber, the State was driuen to make a statute. By authority whereof their lordships proceed in that and others *ex officio*, albeit (in many causes) they haue some party griued, that by way of complaint promoteth and prosecuteth the office. Yet the proceeding is, by way of *enquiry*, in that no man there sueth for priuate recompence, but the scope of the whole processe is *criminall, & ad vindictam publicam, vel corporalem vel pecuniariam, applicandam fisco, non parti*: so that where men haue iust cause of griefe, yet was it thought very expedient and requisite, to provide a sharper course by way of *enquiry of office*. How much more then is this course needfull to be holden for punishing Ecclesiasticall crimes, which (by the policy of this realme) haue no other punishment: and where no man hath (for the most part) any priuate iniury, whereupon to complaine himselfe?

Here perhaps it will be said, that he which can giue information of a crime to a iudge, such may accuse or procure a presentment in an Ecclesiasticall



Ecclesiasticall Court (if it be of that jurisdiction) or may informe and procure an indictment, if the cause be Temporall: or els that it were meet his information be not beleueed, but that hee should be holden as a slanderer and a malicious person. Wee are to remember, that if this *Dilemma* (viz. either thou must accuse and enforme against him, &c. or else thou art but a slanderer) had not *quiddam tertium* to minister answere vnto it, many grieuous faultes should passe vnpunished, and many poore men should be sore pinched. For experience teacheth, that oftentimes *even in crimes publicely committed, you shall hardly finde witnesses, that will depose their direct knowledge, when it tendeth to the offence of some man of countenance, that may doe them a displeasure after*. And therefore they will either say they sawe it not, heard it not, marked it not, or at that time remember it not; yet it is knowen, that a witnesse is vrged by the religion of an oath, and is not entended to thrust himselfe into the matter willingly: which as it ought to serue to take away all offence conceited by him whome he toucheth, so ought it to walte and abandon all feare and other affection, in the witnesse.

Clarus ibi-  
dem qu. 6.

Then howe much more probably may it be supposed, that many a meane man, (though otherwise able to giue good and true information perhaps of three or foure witnesses, which doe knowe the matter more fully, and touching other particularities, sufficient for a Iudge to enquire, and to looke into the partie so *denounced*) who neuerthelesse in many respectes dare not become an open accuser, or a preferrer of *presentment*, of *inditement*, or of *information*? for there is more cause to take offence at such, then at one, who is called and vrged to testifie: so that if there were no meanes for a Iudge Ecclesiasticall to take knowledge, nor to proceede, but vpon the voluntarie prosecution of some partie, (which is the course opposite vnto proceeding *ex officio*) then surely many execrable offences that are most displeasing to Almighty God, offensive to the godly, dangerous to mens inheritances, and the offenders owne foules health, yea and some that be pernicious banes to all religion, vnto professing of God, and to Christianitie it selfe, were like (through want of discouerie and impunitie) to spread themselves, ouer both Church and Common-wealth in very short time, before accusers would be founde: Namely, *Atheisme, Apostasie from Christianitie, Heresie, Idolatrie, Schisme, Error in matter of religion, Sacrilege, Periurie Ecclesiasticall, Blasphemie, Subornation of periurie as well in matters of mariage and testament (being of speciall consequence) as in others, Horrible swearing,*  
*Polygamy*



Polygamy or many wives, Incest, Adulterie, and other uncleannes, Drunkennes, excessive Usurie, Simonie, Forgerie of Ecclesiasticall seales for testimony, Usurpation of the holie Ministerie, dangerous Conuenticles, vngodlie libelling, and such like. For who are commonly made priuie to such finnes, but men of like humour and affection? in whome we may not presuppose such sinceritie of conscience, that for reformation of the partie delinquent, they will abandon all friendship, and aduenture any displeasure euen but to take a triall (with their great charge and trouble) howe they shal be able, to make prooue of such matters against them.

Besides these inconueniences that otherwise would ensue, there be many others, all which (in particularitie) to rehearse, would be ouer tedious. As after an accusation be begun, and that the Iudge see-eth violent presumptions against the partie conuented: if the prosecutor for feare, for tediousnes, for bribes, or by collusion would desist: were it not meete that the Iudge of office should neuertheless proceede by enquire, that the delinquent may reape as he hath deserved? is it not meete that a Iudge should be more carefull of the publike good of the Common-weale, then euerie common person? and if he be so in deede, shall he not be allowed as good meanes to doe these good offices to his Prince and Countrey, as any private person? And shall he not bee as much cherished and allowed upon his owne care, and for his duties sake to procure the suppressing of sinne and reformation of offenders, as to doe it at the instigation of any priuate partie? Nay is there not lesse danger of iniustice by suborning, corrupting, or instructing of witnesses by a Iudge (who hath no priuate interest to see a man punished) then there is in the prosecution by a partie, who (for the most part) doeth it but of malice, or upon some other sinister respect?

Besides, the like equitie may also often happen, (when onely two sufficient witnesses can testifie of a crime: for if the one of these should be driuen of necessitie to be a partie, then the full proofes (required in such cases) were thereby cleare taken away; and so the offender should escape punishment. And therefore there is both necessarie vse, and good equitie, to warrant proceeding *ex officio* in matters criminall.



That the lawes of the Realme doe vse Enquiries and proceedings ex officio, that they allowe it in Courts Ecclesiasticall, with answer to some objections, that are made to the contrary.



N the next place I am to shewe, that dealing by way of enquire or enquest, *ex officio* without suite of a partie, called by the Common lawe *Office del Court*, are both mentioned and practised by the lawes of the Realme. In *Magna Charta* mention is made of a writ of *Inquisition of life and member*. In a

statute of king Edward the third, arraignment at the suite of the King (which is *ex officio*) as a distinct matter from that which is at the suite of a partie, is spoken of: and so are also *Commissions of inquisition* afterward. Furthermore in king Henrie the 6. his time, enquest or inquisition of office is mentioned: and in sundrie statutes both after and afore, which are needlesse to be repeated. For (as I take the matter) every enditement is an *Inquisition*: which if it be at the prosecution of a partie, it is, as *officium promotorum*: but if it be by the Iudges, for the Queene (in respect of the interest of the Common-wealth) then is it *officium merum* or *nobile*. The giuing of the oath of supremacie, appointed by statute to be taken by such, as the L. Chancellor in discretion shall thinke good, is a matter giuen and tendred of *mere officio*, without suite of any partie.

This dealing in sundrie cases is so vsuall at the Common lawe, that there be whole titles made in the Abridgements touching *Inquisition*, and *office del Court*: viz. of enquiries and matters done by the Iudges vpon their discretions, without the instance of any partie. In reports at the Common lawe, we finde it saide, that *Iudges ex officio* did charge an enquest to make enquire of their owne collusion, supposed to be committed amongst them. Further: One of a *lurie* that departed from his fellowes after that he was sworne, was examined at his returne by the *Iudges ex officio*, whether he had since spoken with the defendant or no? Likewise it is saide, that the Court *ex officio* ought to awarde an *Affise* to enquire (whether the disseisin were with force) by reason of the Kings fine. In the booke of *Affises*: The Court *ex officio* sent a man to prison, because they found he had nat made fine. And a great number of particular Articles are there set downe, whereupon Enquest or *Inquisition ex officio* in the Kings Bench is to be made. We finde of elder time by *Bracton*, where the appellour that prosecuteth makes default or dies, there the King may proceede *ex officio*. And againe there: Let the king *ex officio suo*,

Mag. Charta  
ca. 26.

18. Ed. 3. pro  
Clero. c. 2.

42. Edw. 3. c. 4.

8. H. 6. c. 16.

11. H. 7. c. 25. &

1. H. 8. c. 12.

5. Eliz. ca. 1.

M. 20. H. 6. 38.

34. Ed. 3. 3.

11. H. 4. 17.

Affis. lib. 16.

pag. 4.

Affis. lib. 27.

pag. 138.

Bracton li 4. c.

8. fol. 302.

2. H. 8. 12.

and



and for his peace, proceede to Inquisition, for the suspition that he hath of the *Appeale*.

Moreover, where a Parson and Vicar were both willing ynough  
 M. 22. Ed. 4. 23. to sue before the Temporall Iudges: yet the Iudges finding the plea to be of Ecclesiasticall iurisdiction, did *ex officio* at no mans instance dissmisse it out of that Court, as not pertaining to their Iurisdiction. And doe we not often see the ordinarie course for enditements much assisted and holpen by the Iudges and Iustices search, examinations and dealing therein, (of office and dutie onely) both in treasons and felonies, and in other causes of more priuate interelt that be preferred by others? did they not also vpon their owne discretion, and for causes knowne to themselues, without prosecution of any partie, (and so *ex officio* onely) oftentimes commit persons of suspected behauour to prison, and not dissmisse them, till by a writ of enquire *de bono gestu & fama*, they be found worthie to be set at libertie? so that by these fewe, and sundry other that might be brought, it may appeare, that proceeding and enquire *ex officio* is so farre from being so much as a diuerse course from the lawes of the Realme, that it is often practised thereby, when no partie besides the Iudges themselues, doe entermeddle.

2. H. 5. ca. 1.

But it is not onely by that lawe practised, but also allowed by it for a lawfull course of proceeding in Ecclesiasticall Courtes against crimes and offences. By a statute of Henrie the fift, *such an Inquisition of Hospitals of the Kings foundation, is appointed vnto Ordinaries: and in those that be of any other mans foundation, Ordinaries are authorised not onely to enquire of the foundation, estate, and gouernance of them, and of all other matters necessarie in that behalfe, but also to make thereof correction and reformation, after the lawes of holie Church, as to them belongeth*. So that if Ecclesiasticall lawes doe warrant this enquire and course of reformation and correction, then this statute wil giue force vnto it. By another statute: *If any Clerkes be conuicted of incontinent liuing in their bodies (being but afore perhaps openly noised thereof) before whome conuicted? afore Ordinaries. Howe? by examination, and other lawfull prooffe requisite by the lawe of the Church, they may by the Ordinarie at his discretion be committed to ward*. Which together with the committing, must needes be both done *ex officio*: for that no partie to prosecute is there mentioned to be required, and because the Ordinarie thereby may proceede vpon the publike infamie noysed abroad.

1. H. 7. ca. 4.

23. H. 8. ca. 9.

The statute of Citations made afterward, mentioneth a case where an inferior Ordinarie may be partie to a suite holden afore him: which may



may aswel be vnderstood in a cause mooued of Office for an offence, as in any other matter. But more plainly afterward: for there that word is vsed, and it is provided, that the forfeiture of that statute, for calling a man out of the iurisdiction where he dwelleth, shall runne against him that cited, whether he proceede by vertue of his office, or at the suite of any person. Wherof may be gathered, that the lawes of the realme take knowledge of that courle *ex officio* to bee as warrantable as the other made at the suite of a partie: so that other requisites be obserued. And though the statute against *Heresie* stand nowe repealed, yet it may serue to prooue, that not onely *Inquiry*, but *examination* also of the party himselfe in a *visitation* by *Ordinaries* (both which are done *ex officio*) is holden for a course of the lawe ecclesiasticall not to be condemned or disallowed by the lawes of the Realme.

In a statute touching *Ordinaries* scales now also repealed, certaine ecclesiasticall causes bee there rehearsed: amongs which, causes of instance *betwixt party and party*, are plainly seuered and distinguished from causes of *correction*: thereby giuing vs to vnderstand also howe rarely causes of *correction* bee prosecuted by any party, but by the Iudge ecclesiasticall himselfe alone proceeding of Office. and by a statute in the first yeere of her Maiesties raigne, made for *uniformitie of Common prayer*, *Ordinaries* are autorised to *inquire and to punish &c.* the violation of that act, as heretofore hath bene vsed in like cases, by the *Queenes ecclesiasticall lawes*. But that an *Enquiry* is alwayes of Office, and what the lawes ecclesiasticall bee in this behalfe, and howe the continual vse hath bene, is shewed afore: so that none neede remaine doubtfull in these poynts.

The very common lawe not only taketh knowledge of this course holden in courtes ecclesiasticall: but in some respect doth also priuiledge it, euen aboue the proceeding by a party. For if an *Ordinarie* doe sequester goods of the dead for any contumacie or *ex Officio*, which giueth no possession to him, the court spirituell (in this case) shall haue *Iurisdiction*. and it seemeth by that case, the lawe to be otherwise, when it is at the suite of a party. So in a case of violent handes layde vpon a Clerke, both *Brian and Littleton* helde (no man gaine saying of it) that the spirituell court may punish it *ex officio*, but not at the suite of the partie: least the beater thereby be kept from his absolution, till some temporall due-ric be contented and payde. And *Mordant* was of opinion, that if a man be sued by a partie pro latione fidei in not paying a summe of money promised, there shall lie a *Prohibition*: yet if the iudge ecclesiasticall shall doe it *ex officio*, that then no *Prohibition* shall lie. Neither doth any gaine-



Assis.lib.22.  
pag.70.  
Fitzh.nou.  
nat.breu.tit.  
Consultation  
fol.50.&c.

say him herein. Vnto which opinion of his, another iudgement giuen in the booke of Assises in like case seemeth to accord. To like effect also *Fitzherbert* reporteth, that an *Ordinarie* may cite and proceede against a man *ex Officio* pro violenta manum iniectiōe in Clericum: likewise for tithes detained in the time of vacation of a benefice: so he may cite also such as refuse to maintaine a Curat or Chapleine: and for fornication or like offences. By all which may appeare, both the practise of *Inquisition* and proceeding *ex officio* in some cases by the lawes of the Realme, and the allowance also by those lawes of such course holden in courtes Ecclesiasticall both in offences and in sundry other causes also, that be neither *testamentarie* nor *matrimoniall*.

But it may perhaps be sayde, that great abuse may hereupon followe, if the Iudge list to vexe a man wrongfully: for hee may pretend strong *Evidence* and *Information* or a *common fame* to be against a man, or such like afore shewed, whereof he is credibly aduertised. Well, if it be but so much, that the ecclesiasticall Iudge (when hee is called by his superiour) must be able to make prooue of some such: it is more then a Iudge or Iustice of peace neede shewe, why hee calleth any man into trouble, or bindeth him to the peace or to the good behauiour. And what lawes can be deuised, but they may be abused? whatsoeuer hath an vse, hath also an abuse, sauing vertue, saith *Aristotle*.

Aristot.in  
Rhetoric.

Besides, is it not as probable that a partie which will accuse, shall doe it of malice to vexe oftentimes an innocent, and to bring him into perill, as a Iudge who reapeth no commoditie thereby, but satisfaction of his duetie? and is not hee more like to deale in these causes with sinceritie, then *quilibet è vulgo*? but by this opinion, such are permitted to accuse & to preferre matter against any, though no *fame*, nor other matter, no not so much as *suspicion* doe appeare.

Is it not then all one, whether the innocent man bee wrongfully vexed by the Iudge, or by a priuate person, who (in a maner) professeth, that hee doth it of malice? neuerthelesse for all this inconuenience, it will not be thought conuenient (I trust) to damme vp the way from euery man both Iudge and partie, to preferre suites against offendours. For if it shoulde bee, in short time there would be neither Iudge nor other, but lewde persons onely that might liue as they list, *Expediit quandoque delatores esse plurimos in Re-pub.* saith *Tully*.

Cicero.

Yea, but it seemeth vnreasonable (will some man say) that a  
man



man should be called into question and not to know his *accusour* or *Denonnceer*. Surely if the way of proceeding by *Accusation* be taken, he is to knowe him: But when by *Demonstration* or *Enquiry*, there be often many weightie and very considerable causes, why euen witnesses, and much lesse those that gaue the information shoulde bee knowen, which euery man of himselfe without rehearfall can weye and call to minde. Besides this is none obiection against all proceeding *ex officio*. For when it is grounded and instituted vpon a *Presentiment* by *Officers* specially appoynted, their names are knowen to him whose Processe is made. Yet I must tell you, that hereby it commeth oft times to passe, that meane men in parishs abroad, and for very foule crimes, doe rather make choise to be bolde with their oath and conscience, then with a delinquent, whom they haue some occasion to feare. But (I pray) what necessitie is there (in Iustice) of knowing the *Relatours*? may not a *Jury* endite a man without any cause openly appearing, as when the matter is either knowen to some of them aforehand, or the *Evidence* (as some times happeneth) is not given openly? which cases happening, the party endited shall neuer knowe who gaue the information, because they are sworne to keepe secret the Queenes, their owne, and their fellowes counsell. Which course for the trouble of the party supposed to be delinquent, doth amount to as much, as if the Iudge *ex officio mero* had done it. The *Lords of the Counsell*, when they haue a supposed malefactor in examination, are they bound in Iustice, or were it but good policie to signifie vnto him who it is that giues the information, and to confront them together at first dash? but howsoeuer these (by circumstances) should be though fit to be caried, it is neither to nor fro, to the condemnation of al proceeding vpon the *office* of the Iudges only, without any party that prosecutes.

## CHAP. 7.

*That the Enquiry ex Officio against Crimes, is allowed both in Ciuill or temporall courts and in Ecclesiasticall also, by those two lawes Canon and Ciuill.*



O prooue that the Canon and Ciuill lawes both, Archid. in c. *felicis* *fin. de*  
doe allow of the course, I shall not neede to stand *pactis* in 6.  
long: because so much hath by the way very ofen & Marianus  
(though hitherto not of purpose) bene declared. in c. *qualiter*  
To alledge therefore for the former once for all: & quando ac-  
*it is the common opinion, that by the Canons, Iudges Ec-* cul. nu. 108.



Abb. in c. r. de  
officio Ordina-  
rii.

Angel. in

fin. Auth. quo.  
oport. epil.  
gl. in l. 2.

si publico. ff.  
de adult.

Gandinus de  
malefic. tit.

quomodo  
cognos. nu. 6.

& passi alii.  
Bald. in l. r.

in initio ff. de  
offic. praesidis.

Prac. Millei.  
fol. 3. nu. 3 r.

Angel. de ma-  
lef. ver. h. ac

est quædam &  
ibi Aug. in

addit. a. nu. 12.  
vsque ad 48.

Decius conf.  
170. nu. 1.

quod est com-  
munis opinio.

Bald. in l. r.  
C qui accusa-

re non possunt  
Bartolus l. in

ter omnes  
recte ff. de

furtis.

D. D. in c. qua-  
liter el. 3. de

adul. c. 1. de  
Innoc. in d. ca.

C. de accusa-  
tione in c. 1.

ad accusa-  
torem in c. 1.

ecclesiasticall may indifferently in euery crime being within their Iurisdiction, proceede Ex officio, for the common benefite. And (as was vpon ano-

ther occasion, alledged afore) when the enquiry is made to the purpose of correcting for the soules health, and not of punishing, the Iudge may

proceede ex officio, though no same were precedent. And againe, when

an enquiry is made of any crime committed against the Maiestie of God, as heresie, blasphemie, &c. the enquiry is of validitie, though it bee without the solemnities of place, time, &c.

By the Ciuill lawe it is so allowed of, as it is called a proceeding per Nobile Iudicis Officium. And albeit the glosse say, that ordinarily

(by that lawe) the Iudge proceedeth not ex officio: yet by reason of the strait course holden therby with al accusers, so that accusation is now

almost generally through the world growen in disuse: it is therefore by such generall custome made lawfull in euery cause, for a Iudge to pro-

ceede (at the Ciuill lawe) ex officio. So that (considering such custome) it is as Ordinarie a remedie nowe, as Accusation. And some reason hereof

is assigned to be this, that the lawe iudgeth euen an Accusour not to be wanting in such proceeding, for that in euery crime Fiscus est Ac-

cusator, the common interest is the Accusour: and it is so farre from being a course disallowed by that law, that (albeit there were no such

custome at all) yet there be very many cases, wherein by the very expresse disposition of that lawe, the Iudge may proceede ex officio.

And this is receiued, not onely in publike and popular misdemea-

nours, but also in priuat offences. For in these (without either complaint or accusation) the Iudge may proceede of office by way of Enquiry, albeit

the lawe set not downe for such any certaine (either corporall or pecuniary) penaltie for then such an offendour is punishable by some extraordinary pe-

nalitie. The reason of this proceeding in priuate crimes is, the very interest, that the common wealth hath, to haue such offences punished. By reason of

which common interest, euen where there is an Accuser, yet if he be away, the Iudge ex officio may proceede and goe on in the cause. And so it

is obserued by common practise, in Ciuill law courts. The like is to be said when the partie will collude with the malefactor: for if hee that was

robbed will collude with the theefe and say he was not robbed: yet if there be likelihood to the contrary, the partie is not beleued, but the Iudge proceedeth ex officio, quia interest reipub. puniri furtum. Touching y penal-

tie due, vpon such proceeding: some writers hold, that the Ordinarie paine appoynted by lawe, is not to bee inflicted vpon proceeding of Office.

But they also make these exceptions: vz. that this doth not holde, where the Crime is notorious: nor where the defendant vpon the Enquiry confesseth



confesseth the crime: nor by the course of the Ciuill lawe. For in these Pleriqueom-  
cases they affirme that the very ordinarie paine (expressed in the nes. D D.  
lawe) may bee imposed. But it is assured, that by *Customie at both* Clarus lib. 5.  
these lawes not onely a milder paine, but the very set paine of lawe it selfe *fin. qu. 49.*  
may bee inflicted, euen when a Iudge hath proceeded of office.

But here some may obiekt, that those lawes doe seeme some-  
times to require an *Accuser*. It is true: but neither alwayes, nor of ne-  
cessitie, as hath bene opened. And it is shewed afore, that publike  
interest, stands in steede of an *Accuser*. Likewise the lawe accoun-  
teth *fame* precedent to be a kinde of *accuser*. And where fame wan-  
teth, other presumptions and *Indicia or evidences* are (in this behalfe)  
*equivalent vnto a fame.*

c. qualiter &  
quando el. 2.  
de accusati.  
Bartol. in l.  
congruit ff. de  
Off. præsidis.

It may further perhaps be vrged, that by Ciuill lawe, this *Enquiry*  
*ex officio*, is counted an extraordinary remedie. If it were so admit-  
ted to be, what would this auail those that oppugne it simply? for  
the rule is, *Vbi cessat remedium Ordinarium, ibi decurritur ad extraor-*  
*dinarium*. And it is not holden, nor is otherwise likely, if a party will  
seriously and with effect prosecute, but that the Ordinarie will cease  
further to deale therein, *ex officio*: yet it is a little afore signified, that  
by reason of such generall custome, this *Enquiry ex officio*, is be-  
come euen by the Ciuill lawe to bee an *Ordinarie* remedie. And be-  
sides that custome *wheresoeuer Enquiry of office is specially permitted*  
*either by lawe* (as in many cases) *or by statute, there it is as ordinarie*  
*remedie as Accusation*. And by the Canon lawe, it is absolutely an *or-*  
*dinarie remedie*.

Specul. Mar-  
ran. de Inqui-  
sit. nu. 39.  
Ibid. nu. 48.

I haue also heard it to haue bene obiekted against this course,  
that badde and infamous persons suggestions, haue bene accepted. If  
it be so, it is but the fault of the persons, not of the law. And if by an  
*appellation* from any *ordinary* Court, this poynt come to hammering,  
it will not be founde absolutely iustificable: yet experience teacheth,  
that not onely *Relatours* (that be infamous and badde persons) bee  
in some cases admitted (by the lawes of this Realme) but they are  
permitted also to be witnesses. As both infamous persons, and those  
that be partakers with the appeached in treasons, murders and felo-  
nies: which is permitted in fauour of the *Prince* and common wealth,  
in detestation of such grieuous crimes, and for the very nature of the  
crimes which are for the most part so perfourmed, as none honest  
persons, but such as themselves, are or can be priuie vnto them.

Vpon the same groundes, the Ciuill lawe also admitteth the like  
witnesses. Therefore is it testified to be the common opinion of writers in  
that

Decius con-  
silio 342. nu. 8.



that lawe, that for the horriblesse of some crimes, witnesses otherwise disabled in law, may be received, as in heresie and in Treason. Also when the truth of the matter cannot be otherwise be had: therefore the rule is, that when the fact is of such qualitie, that other witnesses cannot by any possibilitie be had, in such case those shall be admitted, that are in other cases forbidden by lawe. Therefore none of these, nor any such like frivolous obiections, will bee able to ouerthrowe this course so manifoldly grounded both vpon those former severall lawes, and also vpon reason.

## CHAP. 8.

That the Enquiry and proceeding of Office, without an accuser, is approved by sundry examples of Scripture: with answer to some obiections to the contrary.



On proceeding against crimes by Enquiry, and of Office. Sometimes vpon the denuntiation of one, sometimes vpon the very notoriousnesse of the fact, and sometimes vpon a suspicion onely conceived but still without partie to accuse and prosecute, we finde diuers not obscure traces in the Scripture it

Gene. 38.  
ver. 24. & 25.

felfe. Vnder the law of nature, when one tolde *Judah* prince or head of his familie (and therefore a magistrate) that *Thamar* his daughter in law in her widowhood was begot with child, at that mans onely relation without further accusation, & vpon the Notorious evidence of the fact, of Office he gaue sentence that shee shoulde be burned.

Gene. 44. ver.  
5, 6, 7, 8, 9, & 10

When *Ioseph* had caused his silver cup to be put in *Beniamins* sacke, and his Stewarde was sent from him to search them, who charged them with this theft, and vpon their pretended suspicion onely, did enter to an enquiry, & to make further search: yet there was none of them that called for an accuser, but ioyned as it were issue with him, and flatly denied the matter.

Numbers 5.  
ver. 12. & de-  
inceps.

In the triall of ielousie vpon the onely suspicion of the husbände, (though some thing bee extraordinary therein and ceremoniall) yet in that enquiry by the Priest (to the apparant great perill of the woman if shee were faultie) wee may note this part of Iustice in that course of iudgement: vzt. that there is none accuser or party that pretends he can or will proue it. For of the husband (who findes himselfe griued and therefore Denuntioth her to the Priest) it is saide, this enquiry shall be made, because the spirit of ielousie is vpon him. It is also there said to be done, when the sinne is secret, and the husband knowes it not, but onely suspects it: and when

ver. 14.  
ver. 13.

there



there is no witnesse against her, nor shee taken in the manner. And yet it is testified there, that in this bringing of her to triall and to so dangerous an enquiry, the husband shalbe free from sinne. In the proceeding against Naboth, though it was a most wicked iudgement grounded vpon perjury & subornation, yet we may see, the plot was so layd, as it might seeme to cary a pretence of a due & a iudicial course, wherupon may be truly gathered something touching the manner of proceeding then vsed. For in a solemne fast when Naboth sate iudicially with the rest of the Elders, and chiefe of the people, vpon the onely witnessing of two wicked men in his presence (that he blasphemed God and the king) Naboth was condemned to be stoned.

The matter for which I note it, is this: that the processe was without any accusour or party. For there are named onely the witnesses, the elders and governours, and Naboth the party condemned. By which, (together with the historie of the adulteresse mentioned in the Gospel, being conferred with Deuteronomie) I doe gather, that oftentimes, in their iudiciall proceedings, the Iewes had none other persons that any way dealt, but witnesses, Iudges, and the party against whome they proceeded: for in the Gospel, those that tolde Christ of the womans adultery, are called *accusers* in these words, *Where be those thine accusers?* yet such of them as were without sinne, were willed by him to cast the first stone at her: Alluding therein to that lawe, that the hands of the witnesses shall be first vpon an offendour condemned to kill him. So that none other accusers were there, but the witnesses. This is more plainly proued out of the same booke afterwarde. For where it is saide, that one witnesse shall not rise against a man for any trespassse, or for any sinne, or for any fault that hee offendeth in, but in the mouth of two or three witnesses shall the matter be established: it is forthwith added thus: If a false witnesse rise up against a man to accuse him of trespassse: then both the men which strine together shall stand before the Lord, euen before the Priests and the Iudges, which shalbe in those dayes, and the Iudges shall make diligent inquisition: and if the witnesse be found false, and hath giuen false witnesse against his brother, then shall ye do vnto him, as hee had thought to do vnto his brother. Whereby may appeare that he that is said to accuse, is termed a witness three times, & his falsehood is to be found out by the Iudges Inquisition. This also appeareth more plainly by the story of Susanna, where the Elders were witnesses, and there were none other accusers. So in the condemnation of a disobedient sonne, there is none other accusour, but the very parents that make the complaint, and beare witness

ver. 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

1. Reg. cap. 21.  
ver. 9, 10, 11,  
12, 13.

Ioh. 8. cap. 10.  
Deuter. 17.

Ioh. 8. ver. 10.  
ver. 7.  
Deut. 17. ver. 7

Deut. cap 19.  
ver. 15, 16, 17,  
18, 19.

Deut. 17. ver. 17, 18, 19

Deut. 17. ver. 17, 18, 19

Deut. 17. ver. 17, 18, 19

Deut. cap. 21.  
ver. 18, 19, &c.

witnesse



Deut. cap. 22.  
ver. 14. & c.

witnesse also. Furthermore, at the onely denunciation of an husband, that hee founde not his wife a virgin, shee is put to her clearing before the Iudges. Wherein if shee cleere her selfe, then without her further mediation (the Denouncer) her husband, is to be chastised by the *Elders*, and condemned in a fine to the father of the woman. But if shee bee not founde a maide, she is to be put to death: so that the one of these sentences, must needes be of the Iudges office alone. For if the husband bee the *Accuser* of the woman, then must his condemnation bee *ex officio*, because his owne complaint reacheth no further, but to his wiues condemnation or clearing. But if the womans father be saide in this proceffe to be the *accuser* of the husband, then is the wiues condemnation done *ex officio*. So wee finde

Dan. 13. ve. 51.  
& sic deinceps

that *Daniel* proceeded without any other partie against the wicked *Elders* *ex mero officio*. For hee was both *Judge*, *examiner* and *accuser*.

Luke 16. ver. 2.

By the *parable* of the wastfull steward we are taught, that vpon credible reports onely, we may enter into *examination* and *enquiry* of the misdemeanour of such as bee vnder our authoritie. *Howe is it* (saith the rich man there to his stewarde) *that I heare this of thee? giue an account of thy stewardshippe*. Hee looked for none other to accuse, then himselfe that was to iudge. When by diuine reuelation the hidden and close hypocrisie of *Ananias* and *Saphira* was made

Act. 5. ve. 3. & c.

known vnto *Saint Peter*, and that by speciall oeconomie hee was publicly to proceede to their *examination* and *condemnation* vnto death, he sought none other *accuser*, but himselfe objected, and by his owne *Apostolicall* authoritie proceeded also to sentence against them for that sinne. And if that be truely which is commonly said, *humana iustitia imitatur diuinam*: why should not this course of proceeding be diuine and godly? for God doth as it were make *Enquiry* vpon a crie of sinne coming into his eares, and afterward punisheth without any *accuser*. The Lord came downe, to see the Citie and

Gen. 18. ver.  
20. & 21.

tower of *Babel*, which the sonnes of men builded. And againe afterward touching *Sodome*, the Lord said, because the crie of *Sodome* and *Gomorrah* is great, and because their sinne is exceeding grievous, I will goe downe now and see, whether they haue done altogether according to that crie, which is come vnto mee, and if not, that I may knowe. *Saint*

1. Cor. cap. 5.  
ver. 1. & c.

*Paul* vpon the credible fame and hearesay touching the incestuous *Corinthians*, without any *accuser* or party to sollicite him thereto, determined and adiu'dged he should be committed to *Sathan*. For it is thus said in that place, *it is heard certainly that there is fornication among you &c.*

So



So that we finde in Scripture iudgements by Ciuill Iudges vnto a Ciuill or Temporall punishment, and of Ciuill and Ecclesiasticall, both to like ende, of Ecclesiasticall alone to the same punishment, and of Ecclesiasticall Iudges proceeding to Ecclesiasticall punishments or censures, without any accuser or partie, and therefore by *Enquire ex officio*.

Against this are obiected two places out of the *Actes of the Apostles*. It is not the manner of the Romanes, for fauour to deliuer any man to the death, before that he which is accused, haue the accusers before him, and haue place to defend himselfe, concerning the crime. And the other: I will heare thee when thine accusers also are come. By which they would gather, that the very Heathens knewe it to be contrarie to equitie, to proceede against a man, otherwise then by accusation. But both receiue one answer. In deede the vsuall and most ordinarie way of proceeding among the Romanes in *veteri Republica*. (before it was reduced to a *Monarchie*) was in crimes capitall (where the people was Soueraigne Iudge) by way of accusation. And (next vnto seruice in warre,) eloquently to accuse a man before the people, was the readiest steppe that forward wits sought credite and countenance by, being an especiall meane to beare offices of honour in that Common-wealth. Vpon which occasion it was in great credite and vse, till through sundry calumniations (to bring men wrongfully into perill of attainer,) they were forced *per S. C. Turpilianum*, and other lawes, to lay most grieuous penalties and dangers both vpon those that did not prooue that which they obiected, that did *calumniari, prauaricari*, i. collude, *tergiversari* wrangle, or that did desist from prosecuting: so that, being so dangerous to the accusers in many respects, it became afterwards to be lesse frequented. Yet alwaies both before and after, this they obserued: that when there was any that would be accuser or partie, there the Iudge neuer enquired *ex officio*: for *ubi adest remedium ordinarium, ibi cessat extraordinarium*, as that was holden then, sauing in certeine cases afore by me touched.

But this crime here obiected against Paul, was accounted capitall by the Iemes, and he had ynow that were his accusers, so that there needed to be none *Enquire, ex officio mero*, against him. That he had accusers that appointed to prosecute him, appeareth by these places: The Captaine would know the certaintie, wherefore he was accused of the Iemes. Againe, he was accused of questions of their lawe: and further, Claudius Lysias the Colonell, signifieth plainly by letter to Felix the Gouvernour, that he had commanded his accusers to speake (before the



Actes 24.v.2.

Actes 25.v.7.  
& 18.

Actes 22.v.24.

Duodecim  
Tab.

Gouverneur,) the things, that they had against Paul. So that the Gouverneur not knowing the cause, and knowing that the Accusers were commanded to prosecute before him, had iust occasion to say, that he would then heare him, when his Accusers came. And in the next Chapter, Tertullus an Orator did accordingly come with others of the Iewes, and accused him before Felix. Likewise when he was afterward conuented before Portius Festus, (the Gouverneur that succeeded next) the Iewes that came thither from Ierusalem, laide many and grienous complaints against him. And after more plainly thus; against whome when the Accusers stood up, they brought no crime of such things as I supposed.

But to make it plaine, that the Romanes besides the way of Accusation vsed also (vpon cause) to Enquire of Office: it is saide, that Lysias the Colonell (by occasion of the crie and vprore made against Paul) did (of office) without any mans instigation, commaund that he should be scourged and examined, that he might knowe, wherefore they cried so on him. Where (by the way) appeareth, not onely that he was then proceeded with of office, but also meant to be examined by torture, of matters that might be penall to himselfe. Neither did Paul take exception against this course as vnlawfull, nor the Captaine conceiue any feare that he had done more then he could iustifie, in any other respect but this, because Paul was a Citizen of Rome. For they had a lawe, that a Citizen might not be beaten with roddes, nor tortured any way, but by decree of the people. And yet any other of their subiects might be and were often so vsed.

It is notorious to them that haue read any thing almost of the state of that Common-wealth, that the Dictators (who for their halfe yeere had a Soueraigne authoritie) did enquire and punish, euen capitally *ex officio*, euen as they in discretion thought meete. The Censors of manners had and practised for their five yeeres space, the Enquirie and punishment *ex officio*, of sundry misdemeanors and dissolute courses of life; not capitally, but either by deposing men from their offices and degrees, by noting them with infamie, by corporall punishments of the lighter sort, or by fine, or by all these. So that by the premisses herein may appeare, not onely that Enquirie of office against crimes Ecclesiasticall, is by law of the Romanes iustificable; but in howe many other good considerations and respects, it is both allowed and practised, with humane and diuine approbation.

CHAP.



CHAP. 9.  
The lawfulness of oathes: what an oath is: resolution of some usuall and not unnecessary questions about oathes: and the reason, or originall Formall cause, of the use of oathes.



That which followeth next to be handled (according to the order that I have proposed to my selfe, in the first Chapter of this second part) is their challenges taken to the oath of the partie, which is sued and contented, and they are, either against the Ceremonie and outward actions used in taking it, or else because it is given to tie the partie to answer, in a cause criminall and penall unto himselfe. This matter of an oath is a principall challenge of theirs, and which they drawe and spinne out into many more particular exceptions. And it is the thing (together with proceeding against crimes and offences by way of Enquirie ex officio) wherein you most especially desire a full resolution, which I would to God either in the rest or in this, I were as able to doe, as I am ready and willing, and as the matter it selfe and goodnes of the cause would yeelde and afford, to a skillfull and sufficient man. But the rather to performe my promised utmost endeavour, I holde it not amisse, for better vnderstanding of the rest, to touch (as briefly and plainly as I can) the nature of an oath, and some not vnnecessary questions about that matter, which I have collected.

First I will touch (but very briefly, not taking vpon me to doe it in sorte as Diuines could) the lawfulness of oathes, with answer to some obiections, which is the question *An sit?* I will stande the lesse herein, *ne inde videar illis inuidiam conflare velle*: as if the inuouating Disciplinarians, did directly condemne oathes before Magistrates, which most solemnly they protest they do not. Albeit if all their positions hereabouts were scanned and compared together (some hotden and deliuered by one, and some by others of them) shrewde and lewde conclusions, both pricking fast forward to this point, would necessarily thereupon followe.

Next, I wil handle what it is, which is the question *Quid sit?* then, certeine necessary and usuall pointes of doubt, that may be made concerning it, and therefore tending to the better opening of the nature and qualitie of an oath. Afterward, the Original Formall cause, and also finall of an oath, which is the question *in idem*, (that is) why it is. And lastly, how many sortes & seuerall kinds of oathes they be, with some description of them, whereby you may the better vnderstande



what they are, and howe they differ one from another : which is the question *variorum*, of what sorte and qualitie.

Exod. 20. v.  
Deut. 5. v. 11.  
Exod. 19. v. 12.

Deut. 6. v. 13.

Ierem. 4. v. 2.

Matt. 5. v. 33.  
& 34.

August. lib. de  
mendacio. ca.  
15.

Thomas.

The lawfulness of an oath appeareth, in that we are in the *Decalogue* forbidden, to take Gods holy name in vaine. And in *Exodus* it is saide: *Thou shalt not sweare by my name falsely, neither shalt thou defile the name of thy God, I am the Lord.* So that to sweare, is not simply and absolutely forbidden, but *swearing in vaine, and forswearing.* But in *Deuteronomie* there is a flat commandement to sweare, and it is there ioyned with the feare and seruice of God, as being an effect of both. *Thou shalt feare the Lorde thy God, and serue him, and shalt sweare by his name.* And in the Prophet *Ieremie* thus: *Thou shalt sweare, the Lorde liueth, in truethe, in iudgement, and in iustice, and the nations shall be blessed in him, and glorie in him.* Therefore where *Christ* telling what was saide of olde time, viz, *Thou shalt not forswear thy selfe, but shalt performe thine oathes to the Lord,* doeth after adde this, *Sweare not at all,* must haue another interpretation, then *Anabaptists* (that be aduersaries to all oathes) doe frame. for the holy Ghost is not contrarie to himselfe: there is not one God who is Author of the olde Testament, and another of the newe, (as some blasphemous Heretikes holde) and *Christ* came not to dissolue the Morall lawe of God, but to fulfill it: and the holy men that are reported to haue vsed oathes both in the olde and in the new Testament, and haue allowed them by their *Canonicall* writings, were no takers of Gods holie name in vaine, nor mistakers of *Christ*s meaning: for they had the spirit of *Christ* speaking in them. In which respect *S. Augustine* saith hereof thus: *by that which the Saintes and holy men in Scripture did practise, may be gathered (oftentimes) howe the Commandements comprised in it, are to be vnderstoode.* Howe then is that Commandement of *Christ* to be vnderstood? The same Father in the same place doeth teach vs. *The Apostle* (saith he) *in that he sweareth in his Epistles, doeth thereby shewe vnto vs, how that saying is to be vnderstood: I say vnto you, sweare not at all; that is, not so to sweare, as to doe it lightly and easily, and so (happely) to fall from that vnto a custome of swearing, and from customably swearing, vnto plaine forswearing.* Therefore wee finde not that the *Apostle* did sweare but in his writings: where a more warie consideration is a staye vnto the rashnes of the tongue. It is grauely and cruelly saide, by a verie learned Schooleman, thus: *an oath in it selfe is both lawfull and honest: this appeareth by the originall of it: which is, because men beleoue, that G O D is truethe that cannot be deceiued, and also haue knowledge of all thinges. Likewise by the ende, because an oath serueth* often-



often times for clearing of men, and taking up of controversies, as is said in the first chapter to the Hebrews: but yet an oath may turne to the euill of him which vseth it ill: that is, without necessity and due caution.

Therefore where it is said further by Christ: Let your communication be yea, yea, Nay, nay: for whatsoever is more than these, cometh of euill, hath another meaning then it seemeth to carry at first shew, ex-cortice verborum. For the same father saith in another place thus: If thou be compelled to sweare, know that it necessarily cometh of their weaknesse, whom thou goest about to perswade, and this infirmity is a kinde of euill. Therefore he doth not say, Whatsoever is more, is euill, but com-meth of euill. For thou doest not euill, who vsest thy swearing well, to be in- tent to perswade another man in some matter of moment: but it cometh of a kinde of euill in him, for whose infirmity thou art compelled to sweare. But Gratian teacheth vs, that by this word (Euill) in this place, wicked- nesse or sinne is not to be understood, but a punishment of sinne, *Pena pec- cati*. Neither can this swearing be construed to be a tempting of God, because he that sweareth doeth not call the helpe of God for him therein, but vpon some good occasion or necessity. The very heathens by the slender glimpse of the light of nature left vnto them, did see the lawfulnessse and necessary vse thereof. Aristotle saith: *Τὸ ὅρκον τὸ ἀποσβεστικόν. ὁρκὸς δὲ τιμωρικόν ἐστι.* Most ancient is most honorable. But an oath is a most worthy or a most honorable thing. And an heathen Ciuill lawyer giueth it this eulogy: *Iuramentum, maximum expedi- darum litium remedium*. An oath is an especiall meane for dispatch of suites. So that in respect of him which is called to witnesse in an oath, it is a diuine and religious matter: but in respect of the thing (often times) whereupon it is brought, it is an humane and ciuill matter.

Now followeth what it is: and first touching the name of it in the Latine tongue: wherein it is knowne by three seuerall words. The first is *Iuramentum*, a word deuied a iure, of right or law, as a thing required by both: and this is of most generall vse vnto all other. The second is *Iusurandum*, seruing sometimes in generall for euery oath, but most properly & specially in the Ciuill law referred to that oath, which is called *Decisarium*, which is touched afterwards. The third word is *Sacramentum*, a *sacando*: because thereby a man doth deuoute- ly vow up and giue ouer his owne safeguard and prospering vnto God, if wil- lingly and wittingly he sweare falsely: which last word in the Emperours dayes (whose constitutions are set downe in *Codice Iustiniani*) was most of all the three in vse: and so is it vsed for an oath, in all the La-

August. lib. 1. de serm. Dom. in monte. c. 30.

12. q. 1. cap. 16.

Arist. 1. Metaph. b. cap. 3.

L. 1. in princip. ff. de iure iurando.

Quintili lib. 5. ca. de iure iurando.



August. serm.  
28. de verbis  
Apostoli  
Cic. 3. officior.  
Azo in summa  
Hieron. in 4.  
Jeremi 2. 28.  
Chromatius  
in 5. Matth.

rine entries at the Conjuratour, and thereof comes their French word *Serment*. *S. Augustine* saith, *Iurare, est in veritate Deo red- dere.* And againe in the same place: *Quid est iurare per Deum, nisi te- ste esse Deum?* *Fullo* defineth it thus: *In iuramentum est affirmatio religi- osa.* But most fully and briefly by *John*: *In iuramentum est affirmatio vel negatio, adhibita religione.* So is not tied to any certaine forme of words, but in this behalfe is very manifolde. *S. Jerome* saith: *Where we finde in the Olde testamēt, The Lord saith, this is an oath.* And an- other olde writer farre more generally: *Whosoever* (saith he) *speaketh the truth, doth (in some sort) sweare: because it is written, A faithfull wit- nesse doth not speake vniuersally.*

It may be asked how and in what respect (by an oath) is God said to be called to witnesse? I answer with the *Schoolemen*, in two re- spects. The first is, because God oftentimes reueileth and bringeth forth the very truth of a matter to light, either by inward inspiration of some person, or by bringing that to the open light, which was a- fore kept secrete. The second respect is, for his punishing of him that sweates tyrannically, and herein is he both iudge and witnesse either in this world or in the world to come. The heathen Lawyers could say: *Qui perierat, satis est quod Deum habet witness.*

We are said to performe our oathes to God two wayes: either be- cause we do in truth fulfil that we sweare: or for that the very calling of him to witnesse, is an acknowledging that he knowes all things, and is of an infallible truth.

When there may be some doubt in the words of any oath, question is made according to what fence it is to be vnderstood. This *Isidorus* answereth thus: *With what equite of words soever a man sweare, yet God that is witnesse of the conscience, so takes it, as he that giues the oath doth vnderstand it.* For such a man that will thus quarrell upon the words, is guilty two wayes: both because he takes Gods name in vaine, and in- cumbrēt his neighbour by deceit. Therefore, if he hath sweareth, meane not fraudulently, then is he bound, according to his owne true intention. For in this case it is said (because the words may be of another signi- fication, then either the one or the other meaneth) in this maner: *Ream linguam non facit nisi mens rea.* It is not the words, but the guiltie heart that makes the perjurie.

It may be asked also, whether every oath is simply and abso- lutely to be kept. Wherin I will note vnto you what I finde proba- bly said, and leave the resolution to graue *Doctors*. An oath may tend to a worse issue then at first (perhaps) was thought on, three wayes:

Isidor. lib. 2.  
de summo bo-  
no cap. 31.

August. de ver-  
bis Apostoli  
serm. 28. aliis

30.



wayes: either when the thing vowed by oath to be done, was at the very first taking of it, simply, and in it selfe euill: or when it was an hinderance and let to a greater good, (as if an able man for it, would sweare neuer to be a Minister of Gods word and Sacraments, what desire fouer himselfe, or what neede fouer the Church, of God should haue of his labours) or lastly, by reason that some vnexpected matter falleth out, not then thought vpon, as in *Iephthe* his oath. In the first case, a man sinnes both in swearing, and also sinnes if he keepe it. In the second case he sinnes in swearing, but not in keeping his oath: but it is holden by the *Sabbeolemen*, that it is much better for him, if he breake such oath or vow. In the third case, if the vnpremeditate thing that falleth after out, be vnlawfull in it selfe, a man sinnes if he keepe his oath. *St. Ambrose* therefore saith thus: *It is sometimes against Christian duty, to performe a vow promised by oath: so Herode offended, which put Iohn Baptist to death, rather then he would go backe with his promise.*

Ambros. lib. 3.  
de officijs c. 12.

Doubts are likewise made, whether and how farre any man may discharge or dispense with an oath. Touching this, there be oathes of two sorts, in respect of time: the one is *Affertorie*, that is, concerning some thing past or present: and heerein there is no doubt, but that it can not be discharged or dispensed with, by any humane authority. For the matter of it being of a thing past or then present, is absolutely immutable, and therefore vndischargeable and vndispensible. The other is an oath *Promissorie*, that is, a promise of some thing to be done hereafter: and heerein some doubt may rest. This *Promissorie* oath, may concerne a promise tending to the honour of God immediately, or the benefite of others: and then no man can discharge from it, or dispense with it, except it were but conditionally made, or by such an one, as is vnder another mans subiection. For an husband (before any ratification by himselfe giuen *tacite* or *expresse*) may by Gods law disallow his wiues oathes and vowes, or his daughters, being in her youth, and in his house, of what sort fouer they be, yea though they be made to humble the soule, and the Lord will forgive her. Or such *Promissorie* oath tendeth onely to the profit and benefite of him, to whome such promise is made: as an oath of allegiance, or of seruing some man. For in this case, it is generally receiued, that he, to whose onely vse it was made, may discharge the partie of it. For it is intended, that the promise is performed vnto him, when it is disposed of, according to his pleasure, and as he taketh it, to be for his benefite. But when a thing is promised

Vide 34. E. 3.  
cap. 9.

Numer. 30. per  
totum.

V. 14. ibid.



Ted with an oath, whereof it may be iustly doubted, whether it be lawfull or vnlawfull, profitable or hurtfull: and that either simply and absolutely, or but in some case: whether any dispensation or discharge may be in this case, and how, deepe *Diuines* can best resolue.

But this is assured, that no dispensation for an oath can reach thus farre, as that a man may doe against his oath: for this is impossible, because the obseruation of an oath is *preceptum iuris diuini*, and therefore vndispensable. But if any dispensation may be about an oath, it can not reach any further then thus, that the matter falling vnder that oath, may be declared not to be contained vnder such oath, as being no due matter or subiect of an oath: yet it is to be doubted that this latter part of the *Schoolemens* distinction, is rather subtle then sound, and a difference in words onely, rather then of matter. Dispensations that princes lawfully giue about obseruation of statutes confirmed by oath, do rest vpon another foundation: for thereby it is intended that vnto such a person, and in such a case, the statutes are reuoked, and therefore of no force to binde; for the oath doth but binde so long as it is a statute, which the prince may reuoke at pleasure, and may make it to be no statute. If a prince or priuate person be to contract (by mutuall oathes) with a prince or with another person, that takes his oath by false Gods, as with a *Mahumetane* or other *Pagane*; it may be asked whether a *Christian* may contract with him that vseth such oathes, seeing the party that sweareth by them, sinneth manifestly, by giuing thereby diuine reuerence vnto them. This question was asked of *S. Augustine* by *Publicola*. He doth thus answer it: *He that vseth the credit of him, that sweareth by false Gods, not vnto euill but vnto good, he doth not ioyne himselfe to that sinne of swearing by deuils, but is partaker with those lawfull covenants, wherein the other keepeth his faith and oath: but if a Christian should any way induce another to sweare by them, heerein he should sinne grievously.*

August. ad  
Publicolam  
epist. 154.

Seeing to sweare when, and how a man ought, is a seruice due to God, and commanded: why should politike lawes repell any sort of men from taking an oath? Surely those which be children, or be mad, or such like, are refused, because they haue no perfit vse of reason, by the which they might so duely and reuerently consider of it, as apperteineth: and perjured persons likewise, because by their former behaviour it is made apparant, how slender account they make of an oath; which contempt is presumed (by law) still to remaine in them.

The most generall formall cause, and also finall of every lawfull oath,



oath, is for a confirmation of that whereof we sweare. Now the confirmation of matters within compasse of *Science*, is made by discourse of reason, proceeding vpon points knowen by the light of nature, to be vnfallibly true. But the seuerall accidentall facts of men, can not by such necessary discourse of reason be confirmed: and therefore those things that are spoken concerning such matters, are for the most part confirmed by witnesses. But a mans testimony alone, was not thought sufficient for confirmation of that which was to be deliuered. One cause why it is not so to be thought, is the want of care to deliuer a sincere truth that most men be possessed with (through corruption of our nature) but rather in stead thereof very vntruths, as by wicked affections we be led. Secondly, humaine testimony is not sufficient by reason of want of knowledge: for men can not know things that be to come, nor secrets of other mens hearts, nor things absent and done in farre distant and remote places from vs. Yet because there be occasions to speake hereof, and for that it is most requisite in the common affaires of the world, that a certainty euen of these matters may be had, (for sundry and manifold occasions happening) therefore it was necessary to haue recourse to some more *diuine* testimony; for that in God there is neither vntruth, nor any thing is hidden from him. Now he that sweareth, doth therein call God to witnesse, and as it were vseth Gods testimony to concurre with his owne saying. Therefore is it generally by all nations presumed, that what is spoken with such inuocation of *diuine* testimony, is holden for a truth. For nothing can be said to be confirmed or strengthened, but by some matter of that is more certainty, and is better: yet when as God in the Scriptures is said to sweare, it is not done in respect of any defect or want in his *diuine* Maiesty, either of truth, or as if it were not needfull to rest in his single word: but it is done for this end, to teach vs, that what is so confirmed, doth proceed from the infallible and vnremoueable disposition of almighty God.

## CHAP. 10.

*Diuisions of oathes according to the outward forme of taking them: according to the matter, and inward forme of them: with plaine descriptions of euery seuerall kinde of oath.*



Ext followeth to be discussed, how many sorts and seuerall kindes of oathes there be, and how they differ one from another. An oath as touching the outward forme of swearing, is either *verbally* or *corporally* taken. *Verbally*, when by words or speech onely, we conceiue the forme of the oath, as: God



is my witnesse, The Lord liueth, &c. *Corporall*, when by some outward gesture in taking the oath, or when by some outward act we testify that we accept of it as it is ministered: as by laying hand on a booke, on our brest, or vnder his thigh that ministreth it, as *Abrahams* seruant did. Either of these may be giuen and taken, in two seuerall sorts. Either simply, as thus: *I speake it before God, or by God, &c.* or with some imprecation to our selues or others whom we holde very deare vnto vs, as thus: So & so do God vnto me and more: for thereby we do expressely as it were deuote & binde ouer our selues or them, vnto the punishment of God, if that be not true which we sweare. Of this kinde I finde examples in Scripture, that some were so imposed by magistrates; & other some were voluntarily so taken. The examples of them both, you may see in their seuerall places, according to the direction giuen by quotations in the margent. An example of an oath taken voluntarily by imprecation, we also finde in the New testament: for *Paul* saith, *I call God to witnesse vnto my soule*: which is to execrate his owne soule, if he had not sworne truely. So much of the outward forme of an oath.

1. Sam. 14. v. 24

Neh. 5. v. 12, 13

1. Sam. 14. v. 44

1. Sam. 20. v. 13

2. Sa. 3. v. 9, 35

2. Sam. 19. v. 13

Neh. 10. v. 29

2. Cor. 1. v. 23

Tot. titul. ex.  
de iure iurando.  
l. vt iuri iurandi ff. de operis libertorum.

There remaine two principall diuisions of an oath; the one respecting the matter of it, according to the *circumstance of time*: the other, that considereth the *inward forme with oiber circumstances*. For the first, euery oath is either *concerning a thing past or present*: and this is called *Affertorium iuramentum*: or els touching a thing to come, & is called *Iuramentum promissorium*. Now for the second diuision in a *Promissory oath*, it may be done either *iudicially*, or *extra iudicially*. And these are either *Confirmatoria actus futuri*, as (in iudgement) that I will vse no vaine cauillations and delayes: and forth of iudgement, as an *oath of allegiance*: or they are *obligationis introductoria*, when the very oath worketh the bond in law, for something afterward to be done. But this is onely by the *Canon* and not by the *Ciwill lawes*, sauing in one case, that I can call to minde: which is the oath of a man once bond, and now set free (called *Libertus*) made vnto his patron, to performe some works or thing vnto him. For in this case the very oath is *obligationis introductorium*, and maketh the freed man bound (by that law) to performe it.

The *promissory oath* further, whether taken in iudgement or out of iudgement, is either *necessary*, as when it is imposed by the *magistrate* vpon his subiect; or is *voluntary*. But for the second kinde of diuision in an *oath assertory* (being of chiefest vse, and therefore most to be stood vpon and explained) it is either *extra iudiciall* or *iudiciall*: and both



both these either *necessary* or *voluntary*.

The *indiciall necessary oath* is sometimes given when there is another party in iudgement, & sometimes when there is no party beside, but the iudge proceedeth *ex officio*. When there is a party, it is either *iuramentum calumnie, veritatis*, or *purgationis*: but if there is no party beside, it is either *purgatorium tantum*, or *purgatorium & inquisitorium simul*.

The *indiciall and voluntary oath*, is either *suppletorium, estimatorium in litem*, or *decisorium*: which last is often times confounded with *iudiciale iuramentum*, without further addition, for the more frequent vse of it, in Ciuill law courts in elder times, when men durst trust one anothers conscience, better then now (generally) they haue cause to doe. The *decisory oath* is either *delatum* or *relatum*, by the one of the parties that are in suite together.

Now I minde briefly and plainely (without tying my selfe to any exact definitions) to describe these vnto you, with onely quotations of the Scripture (where examples of them may be found as I conceiue it) for auoyding of tediousnesse, by particular rehearfall.

*Affertory* is, when by oath any thing past or present, is affirmed or denied to be. Gen. 43. v. 3. 1. Sam. 25. v. 26. 1. Sam. 26. v. 10, 16. 1. Sam. 29. v. 6. 2. Sam. 4. v. 9. 2. Sam. 19. v. 7.

A *promissory* is, when any thing is by oath promised to be done, or not done. Gen. 24. v. 3. & 9. Gen. 47. v. 31. Leuit. 5. v. 4. Num. 30. v. 3. & 14. Ios. 1. v. 6. Ios. 2. v. 12. Ios. 6. v. 22. Ios. 9. v. 15, 18, 19, 20. Iud. 15. v. 12. 1. Sam. 14. v. 45. 1. Sam. 28. v. 10. 2. Sam. 3. v. 35. 2. Sam. 19. v. 13. 1. Reg. 1. v. 13. & 17.

In a *promissory oath* there is a double bond before God; the one is, that it is sinne, if truth be wanting: and the other is, that he is bound to doe that which he promiseth: but in an *affertory oath* there is no bond, but onely this, that the matter be true, which is affirmed thereby, or denied. The effect of a *promissory oath* is, that he is bound to make that true which he hath sworne: but if it were not in his power to do it, then there wanted in such oath, *iudgement and discretion*, except it were in his power to do it when he swore, but became impossible by some casuall euent after happening, that could not be forethought on: in which case neuerthelesse, he is bound to performe it so farre forth, as lieth any way in him. But if the *promissory oath* be made touching such a thing as was in his power, yet such as ought not to be done, either because it was in it selfe euill, or is an hinderance or let of something that is good: then in such an oath *justice* is wanting.



An oath confirmatory is, when it is made for more full assurance of some act to be done or not to be done. Gen. 21. v. 31. Gen. 26. v. 31. Iud. 21. v. 1. 1. Sam. 19. v. 6. 1. Sam. 20. v. 13, 17. 1. Sam. 30. v. 15. 2. Sam. 19. v. 23. 2. Sam. 21. v. 17. 1. Reg. 1. v. 29, 30, 51. 1. Reg. 2. v. 8, 23, 24. 2. Reg. 25. v. 24. 2. Chron. 15. v. 14. Nehe. 7. v. 18. Nehe. 10. v. 29. Ierem. 38 v. 16. Ierem. 40. v. 9. Hebr. 6. v. 16. & 17.

A necessary oath is that, which a magistrate causeth those that be vnder his authority to take, for some convenient purpose & end. 1. Sam. 14. v. 24. & 28. 1. Sam. 24. v. 22. & 23. 1. Reg. 2. v. 42, 43. Ezra. 10. v. 5. Nehe. 5. v. 12. Ios. 23. v. 7. in these words: *Nor cause to sweare by them.*

In law it is defined to be such, (a) as you neither may referre or put over to the other party to take an oath to the contrary, nor yet may be refused by your selfe. For (b) if you do, you shalbe holden as convicted, and the suite must go against you. (a) *Postilla in v. iureiur. l. in bonæ fidei. c. de reb. cred. & iureiur. (b) l. 11. § qui tacuit. ff. de interrog. action. & l. 11. de periurio ff. de in litem iurando. ibi: ex necessitate.*

This necessary oath is tendered by the Iudge, wheresoeuer he seeth cause in equity to moue him, albeit no party make petition: and then is it called *Nobile vel merum iudicis officium*: or els it is tendered and ministred by him, at the petition of a party: and then is it termed *mercenarium iudicis officium*: because thereby he serueth but his turne that maketh the petition.

The first of the necessary sort, is *Iuramentum calumnia*: which is, when one is vrgeth to sweare that he mooues a cause, allegeth or answereth some iudiciall matter, *bona fide*, that is, directly & not captiously: and that he beleeueth it to be true: and thinks he can (in deed) make prooffe of it: and that he doth it not to vex his aduersary, but to relieue himselfe: and not of purpose to delay the suite.

Mascardus de  
probat. vol. 1.  
pag. 18. nu. 6.

*Necessarium iuramentum veritatis* is that, which is ministred to witnesses: and that which is ministred to the partie, that is, to answer vnto positions or articles: and that also is so called, whereby the iudge doth interrogate and examine either of the parties or the witnesses, to the intent to be more fully instructed in the cause.

1. Reg. 8. v. 31.

*Iuramentum purgationis*, where there is a party, is when in a cause criminally moued by some accuser or party, the iudge (vpon defect of sufficient prooffe) doth tender to the defendant an oath to clere himselfe. This though it had his first originall from the canon, yet of long time it hath bene in vse as well in Ciuill or Temporall courts (on the other side of the sea) as in Ecclesiasticall: so that if the defendant shall refuse to take it in either, he is holden *pro confesso & convicto*.

That



That other oath onely of *Purgation* or clearing, when there is no partie in iudgement besides the defendant, is that, which (by reason of fame, scandall, vehement presumption, or by some other of those causes that (as I haue shewed afore) doe open a way to *Enquirie ex officio*) the Iudge doth giue vnto the defendant to his cleering of the very crime obiected, without any meaning to seeke further proofes of that crime, after he haue taken such oath.

The other oath necessary, being partly of clearing, and partly of further *Enquirie*, is that, which (as is next afore saide) is giuen to the Defendant vpon the matter obiected, and circumstances thereof: with purpose to make further proofe, in case the Defendant shal not confesse it, or not so fully in materiall circumstances, as the Iudge hath cause to thinke may be prooued. But if he shall confesse so farre, as is thought may be prooued; then according to the qualitie of such his answer, he is either proceeded with thereupon vnto a iudgement, or else dismissed, as cleared thereof, vpon his oath.

In the *Ordinarie* Courts Ecclesiasticall altogether, and in the *Commission* Court (for the most part) this oath is giuen, when the proceeding is entended against the partie *ad Canonicam pœnam tantum* for his reformation and amendment onely, and not to inflict vpon him the ordinarie punishment, that is, some corporall or other as deepe penaltie as lawe will warrant, except his fault be greatly aggrauated with other circumstances. The examples & other iustification hereof shall more largely be shewed in their proper place hereafter: for this is the oath, that the Innouators doe so much condemne.

Nowe touching *voluntarie Iudiciall oathes*, whereof *Suppletorium* is that, which is tendred to the plaintife or defendant (according to the qualitie of the cause) in a ciuill matter, for supply of proofe made (*Semiplenè tantum*, as happely by one only singular witnesse, without all exception.

*Iuramentum in litem* or *Aestimatorium*, is then giuen by the Iudge, l. i. cum l. se- when the Defendant doth not restore the very thing that is in de- qu. fide in li- maund: in which respect he is to be condemned in the value there- tem iurando. of, and in so much as the plaintife is endammaged, taking it vpon his oath: yet so as the Iudge by equitie may taxe and moderate the summe, as he seeth cause.

*Decisorium iuramentum delatum*, is that, which either the one or the other of the parties first offereth vnto his aduersarie to take, according to that he affirmeth and standeth in: perhaps vpon confidence of his good conscience, or for want of better proofe. So that if

Leuit. 5. v. 1.

Num. 5. v. 12.

&amp; sic deinceps.

Iol. 7. v. 19.

1. Sam. 14. v. 48.

Exod. 22. v. 11.  
1. Regum 8. v. 31.  
Heb. 6. v. 16.

he



Li. iurandum  
34. §. ait Prae-  
tor ff.  
cod. & l. gene-  
raliter 12. §.  
sed iuramen-  
to C. d.  
19 H. 6. 43.

he shall take such oath, then must the matter be adiudged according to his oath, as if the parties had so agreed the cause. But if he shall refuse it, and will not referre it, that is, will not put it ouer vnto his oath, that first made the offer: then shall he be ouerthrowen in the cause, So that to *Referre an oath*, is nothing else, but to offer it backe to be decided by his oath (according to his owne issue) that first made the offer. But if vpon such *Referring* it ouer backe againe, he that made the first offer will not take the oath, then he that so *Referred* it ouer againe, shall haue iudgement passe with him, as if he had sworne when it was first offered him: for *maxima cōpitudine est, nec delatum subire, nec referre iuramentum.*

Examples of these decisorie oathes be also at the Common lawe: for where the Defendant desires, that the plaintife may be examined or sworne, this is peremptorie to the plaintife in this point: and so is the wager of lawe, ex parte defendentis. So by the custome of London, if the Defendant desire to haue the plaintife sworne to his declaration, and he doe it, the Defendant is thereupon condemned.

Iul. Clarus lib.  
5. finali.  
§. qu. 63.

But this oath Decisorie at the Ciuill lawe is neuer used in matters Criminall, except they be mooued Ciuilly (not Criminally) that is for the plaintifes priuate amends and satisfaction: or else the cause be but of small value: or the proceeding in such Criminall cause Criminally, be referred and extended to no corporall, but to a pecuniarie punishment or fine. Thus farre for the generall vnderstanding of the nature of euery seuerall oath.

### CHAP. 11.

That the ceremonies used in taking and giuing Corporall oathes, with laying bands vpon the Bible or Testament, and swearing by the contents of it, are not unlawfull.



He first challenge (now comming to be spoken of) that is made by some of them, against the ceremonie used through this Realme, in all corporall oathes, taken either in Temporall or Ecclesiasticall Courts, is the laying of our hand vpon a booke, when we take the oath. For the better approbation hereof, it is meete to consider the generall ende of it, the particular vse of it, and the generall practise of that, or of the like ceremonie reported both in Scripture, and in other writers, to haue bene used in that action.

The generall and chiefe ende of this or of any the like ceremonie, used in this action, is to signifie thereby, that we doe then aduisedly attend, and giue heede to the oath when we are charged, and that we doe



doe accept of it, and binde our selues as it is giuen.

The vie of this in particular is, to strike a more aduised feare and reuerence into vs: when we consider the reuerence due to an oath, as it is described in that booke, and the curses there threatned against those, that forswear themselves, or take the Lordes name vainely.

The practise of *Corporall oathes* taken with some like effectual and significant ceremonie by the godly, is to be found in Scripture. When *Abraham* caused his seruant (that was vnder his authoritie) to take a *Corporall, Promissorie, and Necessarie oath* for the finding out and fetching of a wife for his sonne *Isaac* of his owne kinred, he willed him to lay his hand vnder his thigh. With this ceremonie likewise did *Iacob* take an oath of his sonne *Ioseph*, that he should not burie him in *Aegypt*, thereby as it were signifying, that sincerely they tooke the oath, euen as they looked for saluation in the promised *Messiah*, that was to descend of those two *Patriarkes*, according to the flesh.

With the like significant ceremonie doth the *Angell* in the *Revelation* swear by the living God, and lifted vp his hands towards heauen, where (by immutable prouidence) that was decreed, and from whence cometh swift iudgement vpon all, that make or loue lie- sings. But the practise of this very ceremonie of swearing, with laying hand vpon the holy Gospels, was both had & allowed by the fathers in the Primitiue Church, as appeareth by *S. Augustine* in his Epistle *ad Publicolanum*.

In the times of the ancient *Christian Emperours*, it was receiued and vsed in Ciuill Courts. An oath (saith *Iustinian*) is then saide to be corporally taken, when a man in swearing doth touch with his hand the holie Gospels. And againe: whether the oath be to be taken in publike iudgement, or in houses, or in holie Oratories, or with touching the holie Scriptures. And it is provided, not onely that they shall be taken *tactis sacrosanctis Euangelis*: but that the Scriptures shall continually be before the Iudges sitting in iudgement, that both they and the suiters may be put in minde, that the iudgement is Gods, and done in his presence.

And by the most generall custome of all *Christendome*, the same ceremonie in taking a *Corporall oath*, is vntill this day continued. But it is reported, that in *Italy* they vse to lay their hand vpon any booke, Bible, or other. And it seemeth by a *French* writer, that they which swear there, doe vse to holde up their hand towards heauen: thereby signifying that they call God to witnesse. In some other places they take a *Corporall oath*, laying their hand on their breast.

Gen. 24 v. 3. &

9.

Gen. 47. v. 29.

Apoc. 10. v. 5.

Aug. ad Publicolanum, epist. 154.

Nouell. Iustin. 8. vel 9.

l. generaliter. in omnib.

C. de rebus creditis & iureiu.

l. rem non novam C. patroni.

C. de iudicijs. Ibidem ante.

Panorm. in c. & si Christus de iureiuram. do. 21. 30. 1.

Duarenus in l. ff. de iure iur. ca. 11. c.

One



One other Ceremonie or manner of taking of an oath, is by some of them reprehended: that is, for swearing *by the Booke*, or *by the contents of it*. I doe not call to minde that by practise or by any lawe in force, this forme here spoken of, to *swear by the booke*, is either vsed or commanded.

1. Eliz. ca. 1.

The manner of swearing *by the contents of the booke*, is prescribed to be vsed in the oath of the Queenes supremacie. But is this the onely cause (thinke ye) that some of that suite refuse wholly to take it, or come very hardly vnto it: some of them mince it, and glose vpon it, and I knowe not with howe many interpretations, limitations, and protestations, doe in very deede take the whole force and true meaning of it away, as deeply as the *Papistes* doe, though in other respects? But it will be saide, that *the contents of the booke* be creatures, and therefore not lawfull to swear by them. Truly it must be confessed, that simply to swear by a creature, is forbidden. *Swear not at all, neither by heauen, &c. nor by earth, &c.* saith our Saviour in the Gospel: which must be vnderstood to be forbidden in any other creature, as well as in those. *S. Hierome* saith: *he that sweareth, either worshippeth, or loneth him by whome he sweareth*. The decrees of *Gratian* doth gather the same prohibition against swearing by creatures, out of sundry olde Fathers and Councils.

Matth. 5. v. 34.  
35. & 36.

Hierony. in 5.  
Matth.  
c. & iurabunt:  
c. confidera. c.  
Clericum. c. si  
quis per: & c.  
mouet te

sicut etiam. 22.  
q. prima.

Amos 8. v. 7.

Gen. 42. v. 15.

1. Sam. 20. v. 3.

1. Sam. 25. v. 26

2. Reg. ca. 2. v.  
3. & 6.

2. Reg. c. 4. v. 30

1. Cor. 15. v. 31.

Aug. in 1. c. ad

Galatas 2. ser.

30. de verbis  
Apostoli.

Swearing is a kinde of religious acte, whereby we giue worship to God as most true, most iust, and knowing all things: and therefore to be taken onely in his name. Yet (these reasons notwithstanding) we finde sundrie examples of most vertuous and godly personages in the Scriptures, that haue sworne by creatures. First, it may seeme that God himselfe so sweareth: where it is saide, *the Lord hath sworne by the excellencie of Iacob*. *Ioseph* did swear thus: *by the life of Pharaoh, ye shall not goe hence, except your yongest brother come hither*. In the communication and treatie of league betwixt *Dauid* and *Jonathan*, it is saide thus: *and Dauid sware againe, &c. as the Lord lieth, and as thy soule lieth, there is but a steppe betweene me and death*. So did *Abigail* swear before *Dauid*: *as the Lorde lieth, and as thy soule lieth*. The very same manner of oath doeth *Elisha* vs to *Eliab* the Prophet, twise in one Chapter: *as the Lord lieth, and as thy soule lieth, I will not leaue thee*.

The *Sunamite* woman sweareth thus to *Elisha* the Prophet: *as the Lorde lieth, and as thy soule lieth, I will not leaue thee*. *S. Paul* writeth thus: *by our reioysing which I haue in Christ Iesus our Lorde, I die daily*. This doth *S. Augustine* affirme, and also proue to be an oath, in two seuerall



seuerall places of his workes: and so doth Bede also our Country-  
man, and an ancient writer.

Beda in 1. Cor.  
15. cap.

Which none of these holy persons, would haue done or suffered in  
their presence to be done, if it had bene either idolatrous or blasphe-  
mous.

In the times of the Primitiue Church, wee finde remembrance of this  
forme of oath taken, viz. by the holy Gospels. S. Augustine saith: It is a  
greater matter to swear by God, then to swear by the Gospels. Which  
prooueth, that this forme of oath was then in vse, and that without  
reprehension. But S. Chrysostome more fully: If (saith he) there be any  
cause at all, it is counted but a light matter to swear by God: but he that  
swareth by the Gospels, is thought to haue done a farre greater matter: to  
whome must be said, ye fooles, the scriptures were made for God, not God for  
the scriptures.

August. ad  
Publicolam.  
epist. 154.

Chrys. Hom.  
44. in Math.  
in opere im-  
perfecto.

The ancient Christian Emperours did set downe by lawe, that this  
forme of oath should be vsed: viz. by God Almightye the father, sonne,  
and holy Ghost, &c. and by the foure Gospels; which I doe holde in mine  
band. And other godly Christian Emperours (afore) allowed euen of  
these kinde of oathes: *Per Salutem Principis: per Genuum Principis:*  
and *Per Venerationem Principis*. Which I doe quote by number one-  
ly, for more breuitie.

Iustinianus  
Nou. Coll. 2.  
const. 3.

2. lib. C. 1. 4. 1.  
4. C. 1. 1. 2.  
4. C. 1. 1. 2.

For resolution of this doubt, I cannot disallow of the Schoole-  
mens answer, that whether the oath be expressly by God, or by im-  
plication, it is not materiall, so that we doe not swear simply by the  
creature. Nowe, there is no man so full of caull, who will conceiue  
when we swear to the oath of Supremacie thus: *so God helpe vs, and*  
*by the contents of the booke*, that thereby we swear either by the co-  
uer, paper, inke, or forme of letters, but rather by the wisdom and  
spirite of God, by which it was endited: & withall, as it were renoun-  
sing all the promises, and calling vpon vs all the curses therein made,  
if we swear not truly. Therefore (say they) there is *relatio ad Deum*  
*actualis* in an oath, when both in wordes and meaning we swear by  
him: and when we swear by some excellent creature not simply,  
but in respect as there shineth in it a great measure of diuine truth or  
Maiestie, then it is called *relatio habitualis ad Deum*, a secret impli-  
ed reference to God himselfe. For as the good that is done to a Pro-  
phet or disciple, in name of a Prophet or disciple, and the despite that  
is done to them, or vnto the poore, redoundeth vnto God, his creator,  
and is said in Scripture to be done vnto God himselfe: so when we  
swear by a creature, with an especiall reference to God the Creator,

Bonaventura.  
Angel. de Cla-  
uasio: & alij.







The manifold equitie and necessitie of an oath, sometimes to be ministered in a cause criminall, and penall vnto the partie.



He most principall challenge (of this sorte of men) is made vnto such oath, as I termed afore An oath of *Pur- gation & Enquiry* both, which is, when a Iudge (having some one or moe of those grounds treated of, & proved afore sufficient (in equitie & law) to ground an *Enquiry* *ex officio*, against a crime) doth accordingly proceede, and vrgeth the

party conuented, to answer the matter & circumstances (whereon the Enquiry is framed) vpon his *corporal oath*, though it be *criminally*, and therby may be penall to himselfe, & perhaps vnto others also. Nowe whether such oath may lawfully be vrged, & therefore not be refused by the partie, is the very issue and question. Crimes & offences are of two sortes: they are either *Prohibita quia mala*, or they be onely *mala quia Prohibita*, that is, either *mala per se*, in their owne nature wicked, & therefore by lawes forbidden: or such as of their owne nature are not simply euill, but therefore made euill, because (for some publike good end) they are forbidden by lawes. Whether in both these sortes of crimes, those men doe thinke such oath to be vnlawfull, or but in the one of them, and in whether of the two: I haue not yet heard any resolution, and therefore will bring my proofes indifferently for either. But these two cautions you must be forewarned of: First, that it is not holden by any law in *England*, nor by practice of any Court here vled, that a man should be examined vpon his oath in a crime, whereby his life or any of his limmes may be endangered. The reason why the lawes thought it vnreasonable to stretch it thus farre, was for feare of *perjurie*, because it cannot be entended of most men, but that they will rather hazard an vntrue oath, then either their life or lims. *Skinne for skinne* (saith *Satan* to *God*) and all that euer a man hath, will he giue for his life. The next is, that if the Iudge haue probable cause to suspect the partie to be such one, as will forweare himselfe rather then tel a truth: there he ought to abstaine from tendering the oath (touching a crime) vnto him. *Iul. Clarus lib. 5. §. fin. qu. 45.*

Iob. 2. 7. 4.

In the handling of this oath ministered to a partie *ex officio*, in a cause criminall, and thereby penall to him, I propound this order to my selfe. First, to deduce downe that equitie (which is afore in the first Chapter of this second part shewed to be in the *Enquiry of office*) vnto this chiefe Acte of such *Enquiry*, that is, of examining the partie by his *Corporall oath*. Next, I meane to shewe it to be so farre from being contrarie to the lawes of the Realme, that by them it is



often vsed and practised. Then, that the lawes of the Realme doe allowe it in Courts Ecclesiasticall. Fourthly, that it is practised and allowed both by Canon and Ciuill lawes. Fifthly, that it is in vse amongst other nations. Sixtly, that it is practised and allowed in Gods lawe. Lastly, I will (God permitting me) answere their obiections, that out of the word of God I haue heard made to the contrary. First therefore touching the equitie of such oath.

All *Enquirie* of crimes, is made in some of these three sortes. First, where neither person nor any deede is knowne to the Iudge in particular to be committed; and such are the *Enquiries* by the *grand Inrie* at the Common law, and the *Enquiries* by *Churchwardens & Side-men* in *Visitations* at the Ecclesiastical law. This is called *Inquisitio generalis*, *Enquirie* or *Enquest generall*. Secondly, *Enquirie* is made, when a facte is knowen to be done, but the delinquent is not knowen. As the *Inquisition* by a *Coroner* (vpon some murder committed) at the Common law, and as the *Enquirie* vpon forgerie committed in some actes in an Ecclesiastical Court; in which kind of *Enquirie*, the person is enquired after in respect of the facte. Lastly, *Enquirie* is made against a person, where there be presumptions and detections that some certain crime is by him committed, but whether he haue committed it or not, it is not certainly knowne: and herein the crime is enquired of, because of the person. The second of these, is termed also *Inquisitio generalis*, but it is not so general as the first: and the last is termed *Inquisitio specialis*. In the first and second of these sorts of *Enquiring*, it wil not (I take it) be denied by any, but that such should be assumed (by the seuerall *Judges* and *Officers* in that behalfe) as they (in their good discretions) thinke most fitte, and to be most likely to knowe the offenders and the offences with their circumstances, and that they be charged vpon their oaths, touching their vtmost knowledges concerning such offenders. And may it not then therby happen and fall out, that an oath shal be ministred to one, who himselfe is such an offender, as is enquired of? For the *Grand Inrie* (as I take it,) haue their oath giuen to enquire and present their owne, their fellowes, and others faults that they shall haue in charge. Yet to auoide this inconueniense, I trust it wil not be thought meete, that all *Enquiries by oaths* should be therefore cleane giuen ouer. Then if this be a thing equal & agreeable vnto law, to vrge an oath euen where it may happen the partie that takes it, to be the offender: why should it not stand with more equitie, to vrge it vpon such an one, as albeit he be particularly detected by great presumptions & probabilities, yet may happen



happen neuerthelesse to be most cleere from the crime imputed to him? Againe, if one of the *grand Iurie* being to be sworne, would deny to take the oath, except he might haue some certeine offences (usually giue in charge) left out & foreprised seuerally out of his oath, least otherwise he should thereby be driuen to accuse himselfe: or if one supposed most able to giue euidence & information to the *Coueners enquest* vpon a murder committed, should desire to be spared from telling his vtmost knowledge thereof vpon his oath, least thereby he be driuen to accuse himselfe: would the *Iudges* or *Officers* hereupon thinke it reasonable to spare these men, and not rather repute them in deed guilty of those crimes, for which they refuse to take oath, to tell and discouer their knowledges? Therefore, why should such men as be probably detected of crimes nothing so penall, who refuse to take oath to answere them, be iudged by any man to do it vpon good ground and conscience? and not rather that they (as the other) refuse it *ob conscientiam proprii sceleris*?

As the equity of this oath is shewed by the former comparisons, so may it also, by consideration of the crimes, and the quantity of them, whereupon it is tendered in courts Ecclesiasticall. None of such crimes haue any punishment appointed vnto them by the temporall lawes of the realme: and by the ecclesiasticall iurisdiction (whereby they onely rest punishable) the penalty is far milder then vpon them, and the like was inflicted by the *Iudiciall* law of God, giuen to his peculiar people: yea not to be accounted (in very trueth and for the most part) any punishment, but rather a medicine, tending to the reformation of the delinquent principally, and next to the terrour and satisfaction of others. Out of this number I onely do except incorrigible *Heretic*, *Atheisme*, & *Apostasie from Christianitie*, which (for the horror and danger of them vnto others) *ense reseruantur, ne pars sine rā trahatur*. Both these three and the rest are in such abomination with almighty God, so manifoldly dangerous to the offender, so noisome and preiudiciall to the lawes, and vnto all ciuill societies of men in a Common wealth: that no well aduised man will thinke them meet to be suffered to take root and grow, but rather by all meanes possible, to be disconered and corrected. But being works of darkness, and by the very remnants of those sparks of knowledge of honest and vn honest, iust and vniust (that continue with vs since *Adams* fall) euen by them that commit them, they are condemned to be such as had need to be shrowded in all secrecie, and therefore they are of that quality and nature, as can not lightly by any possibility be discouered.



discovered, but either by the parties themselves, or other partakers with them in the very crimes, and thereby parties also in the same offences. Yet as *Tertullian* saith, a malefactor for the most part leaveth some footsteps & traces behinde him, which may serue to good purpose for his discovery. Whereupon it cometh to passe, that presumptions fall out to be known abroad of great likelihood and probability, that such crimes and offences haue bene committed & done by such a person. So that when great bruits and fames hereof do flie abroad, to the offence of the godly, to a scandall, and a stumbling blocke vnto the weake Christian, & to the obloquy of our holy faith and profession with the common aduersary: we must either permit such a supposed delinquent thus discovered, to be examined by his oath of the crime, and touching the materiall circumstances of it, or els must we suffer sinnes and grievous enormities (so they be closely committed) to grow vp, and take strength without controulment, till they haue gathered that head, that they shall be able, even with their peize, to ruinate both Church and Common wealth. Which if it be vnrasonable (all things afore weyed) then that whereupon it followeth, must needs be absurd also.

If in heinous and dangerous crimes to the person of the prince or state of the kingdome (whereof there be good probabilities and presumptions against some person) it be holden necessary & lawfull policy, to torture the supposed delinquents, that they may confesse, albeit it be capital to themselves & others also, in the highest degree: is it not of as great equity, in crimes of no lesse secrecy, & some of the in no lesse execration with almighty God then these, to vse the meanes of the parties oath, where no capitall, nor often times no corporall, yea (for the most part) where no punishment at all, but a correcting and reforming of the party, is intended?

When there be great presumptions of complots laid, that are dangerous to the prince and whole state; is it holden good policy to let the parties alone (without either torture or examination) vntill some will voluntarily offer himselfe to be an *accuser*, and to be able to make prooffe of them, though the party be neuer once examined? I feare me greatly, if this were holden for law and equity, such great and secret offences would neuer come to iustice, till there were no man to administer it, but the offenders themselves. And may not then the like be conceiued iustly of crimes subiect to eccles. censure & iurisdiction?

In the diuision of the seuerall kindes of oathes, there are mentioned certaine that be necessary to be taken by the other party, when

as



as there is suite but betwixt two private persons, and touching their owne onely priuate commodity and interest. They are tendered by the Iudge sometimes at the onely petition of the one of the parties, and then is it called *Mercenarium Iudicis officium*, as of more base quality, in that he doth nothing but that which he is (in some sort, as it were) vrged vnto: and sometimes are offered by the Iudge himselfe *ex officio*, without petition of either party, as in equity he seeth cause: and then is it called *Nobile Iudicis officium* (touched also afore) as being of a more high and woorthy respect, and of greater regard. Of these sorts are *Iuramentum calumnie*, *Veritatis*, & *Purgationis*. All these by law are necessary to be taken: but if they be refused, being so tendered, he is ouerthrowen in his cause that refuseth, and is holden *pro confesso & conuicto*. Yet very often it falleth out, that by such oath, the party is drawen to discouer his owne *dolum malum*, *conuict*, *fraud*, or *mal engine*, and other also his owne lewdnesse, both preiudiciall (by law) to his honesty and good name, and also otherwise penall to himselfe: namely, by the nature of *Iuramentum calumnie*, he is to discouer (in some sort) even the cogitations of his heart in that behalfe, *vz.* that he standeth in law, or affirmeth some thing, in a full opinion and confidence that he hath in his owne right, and that the suite as he maintaineth it, seemeth to him good and iust. And further, that whatsoener he shalbe asked about that matter, he shall answere it from time to time truely: and that he neither hath fraudulently giuen, nor will afgine, or promise to giue any thing to corrupt the minde of any man that hath to deale in that cause. Now if in a priuate cause betwixt priuate persons suing but for priuate benefit and commodity, and at one of their petitions, *per mercenarium Iudicis officium*, his aduersary must of necessity take such an oath touching matters (perhaps) of his owne fraud and lewdnesse, and to the discovering often times of matters criminall & penall to himselfe, or els must loose his suite, and be condemned as conuicted by his owne presumed and implied confession: and this both by the Canon and Civill lawes (being the common law in both courts of all other nations abroad in *Christendome*;) then in a publike cause, moued by the Iudge *ex nobili officio*, where he seeth by his discretion, and direction of lawes, good cause in equity, for the publike interest that the Church and Common wealth haue that sinners be punished and repressed, for discharge of his duty according to the trust reposed in him, and not of malice, or to pull any priuate benefit from the party: how much more is it herein equall and necessary that an oath be ministred to such presumed delinquent, for the

l. 2. & Authen  
principales C.  
de iuram. ca-  
lumniae Marr.  
de iura. cal. nu.  
6. Cuiacius l 9  
Obs. cap. 37.

l. 2 C. de iura.  
calumniae.

lb. & d. Auth.  
principales  
1. Instit. de  
poena temere  
litig. Nou. 49.  
cap. 3.



the discouery of the whole truth? or els if he stubbornly shall refuse, that he be holden (as in the other afore) *pro confesso & conuicto*?

When an enemy of malice or other sinister respect doth accuse a man of a crime iudicially, and brings him therupon into question and great danger, if he can not make sufficient proofs for his condemnation, yet by probable presumptions hath so touched him, as thereby he becommeth vnto the Iudge iustly to be holden suspected thereof: in this case (by both the lawes aforesaid) the iudge is to giue an oath of *purgation* to the suspected person, touching that crime; which if he shall refuse, he is holden as conuicted of it: whereby it may happen that his *accuser* is more gratified and pleased, then by any proofes that he himselfe could bring, or could otherwise procure. Is there not then much more equity, when the question and *enquirie* of the crime is stirred vp for a better purpose, and without any such malicious *accuser*, that vpon like presumptions and probabilities, the like oath should be giuen and tendered by the Iudge to such supposed delinquent? Can any man giue a sound reason why it should seeme equall, that when an enemy gaue the first occasion, *pars rea* should then vpon suspicions be vrged to take the oath, or els be condemned of the crime; that it should not be much more equity for him to take it when the Iudge (for his duties sake) doth originally call him into question? And when a man is pressed with such suspicions as the Iudge findeth to be sufficient thereunto, he is iustly put to his oath of clearing himselfe if he so can, and so it tendeth to his owne benefit. Is it not much more reason then, that vpon the like presumptions appearing to the Iudge, he be vrged to that oath, to tell the whole truth of the matter, with the pertinent circumstances, as well for the publike benefits sake of the Common weale, as for his owne good, and escaping of punishment?

Some may perhaps here aske, why the proceeding of the Iudge of office should be more priuiledged in this behalfe, then when a crime is proceeded against by an *accuser* or party? For in the beginning of the suite the Iudge proceeding *ex officio*, may require the oath of the supposed delinquent touching both circumstances and crime: but when he proceedeth by way of *accusation*, albeit in courts Ecclesiasticall the party conuented may be examined by oath vpon other matter of circumstance, yet he may not so be examined touching the very fact and crime, vntill by sufficient presumptions, the Iudge be iuduced to account him greatly to be suspected.

This question almost doth answere it selfe: for when the Iudge proceedeth



proceedeth by *enquiry*, before he offer the oath to the party, the presumptions against the party are knowen vnto the Iudge: but till the Accusour haue brought in such proofes as hee can, they are not knowen vnto him. Besides, the Accuser doeth it of malice (for the most part) or for reuenge, or for other satisfaction of his owne priuate humour: But the Iudge (by common entendment) doth it of sinceritie of minde, and for the good of the common weale. Againe, those that be conuicted vpon such *Enquiry* by the course of the *Ciui*l lawes, Panor. in c. per Inquisitionem de electione, & c. inquisitionis ex. de accusat. are (most vniusually) punished by some milder punishment then when they are conuicted vpon an *Accusation*: yea and in ecclesiasticall courts (for the most part) not so much as punished at all corporally, but meanes onely of enducement to repentance and reformation, are vsed towards them. All which being ioyned to that which hath bene afore spoken, of the equitie of *Enquiry ex officio*, doe sufficiently (I trust) recommend both the generall equitie of the vse of such oath, and also the great necessitie of it in sundry actions and diuers occasions.

## CHAP. 13.

*That oathes of men touching matters dammageable, Criminall, and penall to themselves, are vrged and exacted by the course of the lawes of this Realme.*



Ere I am to shew that the like oath in matters Criminall and that may bee penall to a mans selfe, is practised by the course of the lawes of this realme: and therefore this proceeding is no *contrary* or *repugnant* course vnto them, seeing it is not so much as diuerse from them. The *Chauncery* is a principall and high Court of this Realme, out of which all Originall writes are directed: and is a Court of conscience and equitie to moderate in a modum, v. z. the exact rigour of lawe. In this court though the proceedings for the most part be *Ciui*liter & *non Criminaliter* prosecuted, that is, not to any publike punishment, but for the priuate interest of the party: neuerthelesse many billes of complaints bee there put vp against defendants, wherein sundry lewd practises and misdemeanours Criminall be deduced and set forth, & yet must the defendant make perfit & particular answer thereto vpon his oath. The same course is obserued in other courts of the nature of *Chancery*, as in the Court of requests, and sometimes further also: euen *quando agitur Criminaliter ad poenam partis*: as in the Court of the Counsell in the *Marches* and *principalitie of Wales*, and before her *Maiesties Conu*cell established in the North parts. So that to the intent of being vrged  
by



by oath (sometimes) to discouer himselfe in a matter Criminall, it commeth to as much in these courts as is challenged for vnlawfull in a court Ecclesiasticall.

In the court of *Starre chamber*, the proceedings are against Crimes *Criminall* moued, by way of *Enquiry*, though at the promotion or solicitation of some priuat party (for the most part) griued: as against forgeries, periuries, subornations, riots, routs, and other sundry heinous misdemeanours: against which there lieth no capitall punishment, nor losse of Limme by the lawes. Yet is the defendant there to answere vpon his corporal oath, not only to the bill preferred against him, but to as many other (euen sometimes crosse) Interrogatories, as the counsell of the plaintiffe shall deuise.

But to this (I heare) it is replied by some, that there be two maine differences betwixt this course and the proceedings in a court ecclesiasticall. The first, *that none is there bound to take his oath, but only where there is an accusation preferred against him by another: so as if he purge himselfe lawfully, he is to recover damages.* Touching recovery of damages (if by damages, bee meant costes and charges) these for the most part be in this case giuen euen by the *high Commission*, that is so much impugned. For (except it be for the *Queene*) there is a partie bound to prosecute and to pay charges, if the defendant be molested without cause. But if damages (as they terme them) be recoverable in the *Starre Chamber*, I thinke they are not very great: and where the matter is preferred by her Maiesties learned Counsel, I am told, there be no costes adiudged, though the defendant happen to be cleared. But if (in this behalf) there were any difference, it makes no difference in the poynt in handling: v<sup>z</sup>. that an oath is there giuen to the partie in a cause *Criminall and Penall* to himselfe.

The other part of the replie builded vpon *an accusation there preferred*, is indeede different from the course of ecclesiast. proceeding: but yet the equity hereof in the *Starre Chamber* doth much fortifie the giuing of such oath in Courts ecclesiasticall. In which Courtes if there be an *accuser* or an other party that enfourmeth or promoteth, then the defendant is neuer examined by oath vpon the very crime. For when a partie prosecuteth (who as the law intendeth doth it for malice, reuenge, or some other particular respect) hee is not so much fauoured nor priuiledged in the proceeding, as when the Iudge *ex officio Nobili*, euen for his duties sake, and for the publike commoditie of the common weale makes the *Inquiry*.

If then it be thought both equall and lawfull in the *Starre Chamber*,



ber, at the prosecution euen of a priuat person (who for the most part doth it not of conscience and zeale of Iustice only to haue vice punished) to examine the defendant vpon his oath for discovery oft times of faults & misdemeanours openly done & committed, & so the more easie to be proued by witnesses, and where the punishments are vsually *corporal* & otherwise farre more grieuous then be inflicted in any court ecclesiasticall: then how can it bee in any ecclesiasticall court thought vnreasonable, where *the office*, duety and charge laide vpon the Iudge, are (by common entendement) the only exciter and causes of prosecution, where (if it be an *Ordinary* court) no *corporall* pain but *canonical* penance (for the reformation of the party) is inflicted, and (if it be before the *Commissioners eccles.*) neither their greatest *Corporal* pain is so grieuous nor their fines so deepe? & yet the crimes for the most part are as heinous towards God, & as secretly & closely committed & plotted, as any crimes are y<sup>e</sup> be punishable before their lordships, in that most honorable & sincere court of the *Starre Chamber*.

The second difference taken in this behalfe betwene these proceedings, I heare is this: that in *the Star chamber*, a man is not driuen there to answer directly to the fact it selfe, but onely to the circumstances of the fact, as was in *Trussers case*, as is said. But I am certainly enfourmed (by those that haue better cause to know y<sup>e</sup> practise of that court, then the autor of these obiections & differences) that y<sup>e</sup> practise of that court is cleane otherwise. As for *Trussers case*, it was y<sup>e</sup> felony only, (a matter capital to him) that was ordred not to be enquired of him by oth: but touching y<sup>e</sup> lewd confederacy it self, & of his other practises about it, he was ordered by oath to answer the. So that the reason of the like equity in both courts (these notwithstanding) remaineth stil vnshaken.

And not only in the courts aboue named, but in al the other courts of *Record at Westminster* I am credibly told, that (time out of mind) it hath bene obserued, for the *Judges* by *Corporall* oath to examine any person whom they had cause (in discretion) to suspect to haue dealt lewdly about any writte, returne, entrie of rule, pleading or such like matter (not being capital) touching their seuerall courts: as namely *Sherifs* & their vnder officers and ministers, *Protonotaries*, *Philizars*, *Chirographers*, *keepers of records or rules*, *Clerkes*, and sometime *Councillers* and *Attorneis*, or the very parties hauing suites. But to entreat hereof more particularly, and first of oathes prescribed by statutes. And in these, first of such as be taken in matters that may only bring damage to the takers of such oath: and then, of oathes taken in matters Criminal and Penall to the party that takes them.



13. Ed. 1. stat.  
Winton.

17. Ed. 2. Pre-  
rog. Reg. ca. 4.

25. Ed. 3. de

seru. ca. 2. & 7.

By the statute of *Winchester*, men within certaine yeeres of age, are to bee assessed and also sworne to haue all such assessed armour in their houses. The kings widowes that haue dower of landes holden in chiefe of the king, must bee sworne not to marry without the kings licence. By a statute of king Edward the third, a taxe is set what labourers shall take, and they are thereby appoynted to bee sworne to doe those labours, and to take no more then is allotted to them. And that they shall not in sommer depart, to serue in other places, then where they serued in winter. This oath is to bee taken twise a yeere: and if any of them refuse to take it, he is to be sent to the Stockes or Gaole, till he will reforme himselfe.

27. H. 4. ca. 17.

8. H. 6. cap. 7.

27. Ed. 3. stat.  
stapulae.

11. H. 7. cap. 33

Stat. de Exon.  
de Inquisitio-  
ne super Co-  
ronar.

14. Edw. in  
Rastall.

9. Ed. 3. stat. de  
moneta. ca. 9.

Likewise by another statute afterward, all labourers & seruants are appoynted to be sworne both to doe seruice, and to take for the same, according to the statutes. And if they refuse, they shalbe set in the stocks (for three dayes) till they will agree to it, and if they doe not, from thence shalbe sent to the common Gaole. The sherif hath power (by statute) to examine euery chooser of a knight for the *Parliament*, vpon the *Euangelists*, how much he may dispend by yere.

Those that shall goe about to ship ouer any wools & other marchandises, the *Maio*r of the staple & *Customers* shall make them take oath, that they shall not keepe staple of those marchandises on the other side the sea. Likewise, hee that shall shippe an horse (to carry ouer sea) must sweare, that at the time of shipping of him, and at that time he sweareth, hee is fully purposed not to sell him, but to haue him for his vse. All which oathes though most necessary and equall, yet (you see) howe they may bring great dammage and losse vpon the partie.

Now touching oathes appoynted by statutes, that may tend and reach to make the partie discouer euen matter *Criminall* and *Penall* to himselfe: By the statute of *Inquisition vpon Coroners*, the *Enquirors* shall make all the *Bailiffes* sweare, that they shall well and faithfully doe that which they shall haue in charge by the King and his Counsell, and that they shall conceale nothing of it. Their charge is, not only of misdemeanors of *Coroners*, but also of concealments of murders and felonies, and letting such escape &c. done happely in default of a whole towne-ship in generall, and happely in default of the *Bailiffes* particularly, who be sworne: and therefore *Criminall* and *Penall* to them, yet by vertue of their oathes, not to be concealed.

*Mayors and Bailiffes in euery Port (where marchants and ships be)* shall take an oath of marchants and masters of ships going and returning,

not



that they shall not do any fraud against that ordinance (touching money) in any point. By which oath they not onely are to promise not to do it (for they are to take it at their going) but also that they haue not done it being abroad, because they must take that oath also at their returning. And this being concerning fraude not to be committed, toucheth matter of a mans owne turpitude, besides the penaltie due to the offendour.

If a bill or information bee put vp in any court of record against a man, vpon the statute of *Liueries and Retainers* (being very Criminal and Penall to the offendours) after the Informer hath taken oath, that his complaint is right full, the defendant shall be brought in, and put to answer to such bill or billes, by such information. And the same Iudges and euery of them in euery of the sayd Courts shall haue power in their seuerall iurisdiction, to examine all persons defendants and euery of them vpon such information, and to iudge him or them conuict or acquitted, as well by such examination as by tryall, as the case requireth, after the discretion of the Iudges.

Likewise authoritie is giuen by two seuerall statutes vnto certaine great Officers of the kingdome, *Lords &c.* to call such grieuous offenders (as there be named) vpon bill or information, and them and others (by their discretions by whom the truth may be knowne) to examine. That this examination is by a corporall oath taken, the continual custome in that honorable Court of the Starre chamber obserued, doth shew. And if it were not so to be taken for the parties own oath, then could it not so be vnderstood of the witnesses. For the word *Examine* is indifferently vsed for them all. And Brooke in his *Abridgement* doth testify that euery examination spoken of in law is vpon an oath.

3.H.7.cap.1.

21.H.8.cap.10

5.Eliz.cap.9.

Brooke, titulo, Examination.

nu. 32.

24.H.8. cap.6.

If a *Vintner* shall refuse to sell his wine in grosse (without iust cause) vnto such as offere him the set price thereof in ready money, he shall forfeit as much as the price of the wine. Such *Vintner* also may at the discretion of any officer there named, bee put to affirme and depose vpon his bodily oath, what and howe much quantitie and sorts of wine he shall haue, and whether he keepeth them to sell by retaile or in grosse: and if after such affirmance of intent to retaile them, he shall sell any of them in grosse, he forfeits the double value.

By a statute of Bankrupts, the *Lords* there named, may (vpon relation to them giuen) call any supposed or suspected person to conceale such offenders goods, and may examine them by their oathes, and other wayes, as in discretion they shall thinke meete, vpon the specialtie, certaintie, true declaration and knowledge of such offenders goods, or debts owing to him.

34.H.8. cap.4.



And if he shewe not the whole truth to be after prooued by witnesses &c. then he forfeiteth double the goods concealed. The like authoritie is also giuen to certaine Commissioners to be appoynted by vertue of a latter statute to tender an oath. But in this latter, the double penaltie runnes against him: If either hee doe not upon his oath disclose the whole truth, or shall denie to sweare. The oath of Supremacie is a necessary oath to be taken by such as the L. Chauncellor shall thinke fitte *ex officio* to haue it tendered vnto. Yet if the partie carying a contrary perswasion, shall refuse it, it becomes very criminall and penall vnto him.

5. Eliz. cap. 1.

13. Eliz. cap. 3.

Such as be supposed to be parties and priuies to the fraude, collusion and conuise in conueyances by fugitiues ouer the sea, which fraude &c. are there affirmed to bee things detested and abhorred by all good lawes: may (by statute) by Commissioners appoynted, or by the Barons of the Exchequer, be examined upon their corporal oathe to open and declare plainly the very truth to such interrogatories as shalbe ministred vnto them touching the premisses, and the circumstances and dependances of the same: upon paine (if they shall refuse) to loose such a fine and fines for the sayd contempt, as shalbe assessed by such, before whom such examinations should be made. In which (as in the other statutes mentioned) it is euident, by howe many wayes it may happen, that such oathes shall tend to the vrging of them to discouer matters criminal and penall to themselves that are appoynted to take them. And the foure last alledged, are oathes giuen, where neither Bill nor Information is preferred against the parties examined: and therefore to be tendred and vrged *ex mero Officio*.

Stanford.  
Pleas of the  
Crown. li. 3.  
cap. 14.

At the common lawe also, oathes in matters criminal and penall to the parties be necessarily to be taken when they are enioyned. For if a man sue an appeale of murder against another, who will bee tried by battell, the defendour that is appealed, must (before the battell) holding his aduersary by the hand, solemnely sweare thus: Heare this, you whom I hold by the hand, who call your selfe by such a name, I haue not feloniously murdered your father &c. so God helpe me and all saints. And in matters that may induce dammage to him that sweareth, there bee sundrie examples at the common law: one or two may suffice. If a woman conuert baron (being to acknowledge a fine) it be doubted, whether shee bee 21. yerres of age or no, she shalbe examined vpon her oath. In an action of detinue of goods supposed to be deliuered in Fleetstreet, the plaintiff was examined, where they were deliuered. An obligation bare date in the Countie of Lincolne, & a Scriniens name was put to it, that remained in London:

T. 25. Ed. 3.  
fol 44.

P. 3. H. 6. 38.

H. 3. H. 6. 30.

hereupon



hereupon the plaintiffe was examined, where the obligation was made. Besides the damage hereof, the circumstances of this might bee such as might haue vrged him to discouer (perhaps) a forgerie.

Of oathes ministred at the common lawe, tending to the discouery of matter Criminall and Penall to the partie himselfe, I finde these examples. One sworne of a Iurie, did after depart from his fellowes: in the meane time another was sworne in his rōume. But when the first returned, hee was by the Iudges ex officio examined upon his booke oath, whether hee had talked with the defendant, or bene in his companie since he was sworne. This (if he had confessed it) had bene very Penall vnto him. Neuerthelesse, for his apparant fault, he was committed and fined. M. 34. Ed. 3. fol. 3.

In an action of Formedon, the tenant of the land was supposed to confesse the action of the demaundant by conin, & was thereupon examined by the Iudges: and the conin being thereby found, it was decreed there should be no Iudgement, and that he should be punished by their discretion. A woman brought an appeale for the death of her husband, but as it was supposed by another name then she had in very deed: upon which conin shee should haue bene fined, & thereupon she was examined. A Iury after they were gone together, were supposed to haue receiued a letter on the behalfe of the defendant, which in law is sayd to be a grieuous fault, and is to be grieuously fined (besides that, it maketh the verdict voyd in lawe: ) yet all the Iurours were thereupon examined upon their oathes. A sheriffe returned that certaine witnesses, who should haue appeared were dead. Whereof it was desired he might be examined: because the retorne was razed, and two of the witnesses were saide to be alive, whereof one was then in the hall, and had his remaining in the Countie. Whereupon the sheriffe was examined, as Prisot enfourmed: and deposed, that the retorne was made by a Clerke, and neither by him nor his undersherife, and that hee knewe two of the witnesses were liuing. T. 7. H. 4. fol. 19.  
P. 9. H. 5. 1.  
H. 35. H. 6.  
& Fitzh A.  
bridge. tit. ex-  
aminat. nu. 17.  
M. 37. H. 6. 11

Nowe if he could not (with a safe conscience) thus haue cleared himselfe vpon his oath, had not this razure, and false retorne bene very penall vnto him, being so direct contrary to his oath taken at the entrance into his office? And it was (at another time) the opinion of the whole court, that if the parties had then had a day in court, they might haue examined them touching their conin & lewd practise tending to defeat another man of his lawfull action. I haue also heard that in the time of that reuerend Iudge Dier, the court of common Pleas examined certaine by their oathes touching a very lewd platte laid by some of them: & the names in that cause were (as I remember) Grenill, Pine, and



and *Hecke*. Which being so found out, was condignely also punished both by perpetuall infamie, and with other punishment.

## CHAP. 14.

That such oathes, by the lawes of the Realme, are allowed vnto Ecclesiasticall Courtes.

2.H.5.cap.1.



HAT the lawes of the Realme allowe it vnto courts Ecclesiasticall (which poynt comes next to bee declared) these fewe may here suffice. Ordinaries are authorisid to enquire of the foundation, estate, and gouernance of Hospitals (being not of the kings foundation) and of all other matters necessary in that behalfe, and vpon that to make thereof correction and reformation after the lawes of holy Church, as to them belongeth.

1.H.7.cap.4.

Nowe by those lawes, and so (as I take it) by the temporall lawes, Enquiry touching Crimes is by oath. So that (if any such faults be) they are to discouer these matters (in such their visitation) vpon their oathes: which cannot bee entended but they may bee Criminal and Penall to them, because the statute speaketh that they are to be corrected and reformed. If Clerkes bee conuicted of incontinencie before Ordinaries by Examination, & other lawfull prooffe requisite by the lawe of holy Church, they may be committed to ward. Nowe it is shewed afore, that examination (euen at the common lawe, like as it is at the Ecclesiasticall) is vpon oath. So that such oath is by the iudgement of that statute deemed a lawfull prooffe requisite by the law of holy

21.H.8. cap.5.

Church. Executors and Administratours must giue oath (before Ordinaries) of the truth of such Inuentaries, as they do exhibite. Yet this may implie in it either periury or some discouery of a mans owne fault, if

3.Eliz.cap.1.

he haue dealt therein corruptly & fraudulently. The oath of supremacy may be giuen *ex officio* by any Ordinarie to a Clerke being within his Iurisdiction: yet if such Clerke doe carry a contrary perswasion, it vrgeth him to reuelle and discouer himselfe (by refusall of the oath) which is very Penall vnto him.

3.Eliz.cap.9.

In a statute made against Periurie at the same time, this Promise is contained: that the said Act nor any thing therein contained shall not extend to any spirituall or ecclesiasticall court or courts within this realme of England or Wales, or the Marches of the same: but that all & euery such offendour or offendours, as shall offend in foure afore said, shall and may be punished by such vsuall and ordinary lawes, as heretofore hath bene and yet is vsed and frequented in the saide ecclesiasticall courtes: any thing in this

present



*present act to the contrary notwithstanding.* Where I thinke it will not be doubted but that vnder that word *Punish*, is vnderstood the whole course also *used by those lawes*, which tended to the conuicting of such faults as be thereby to be punished. It was neuer claimed nor vsed by any Ecclesiasticall courts either afore or after, to punish any *Periury* or *subornation of periury*, but either for breach of oathes voluntarily taken, called *Lesio fidei* (according as is shewed in the first part) or for *Periury & subornation thereof* committed in an Ecclesiasticall court and matter. So that it can not be intended, but that this statute (meaning to reserue vnto courts Ecclesiasticall, the punishment of false oathes there made) did minde withall rather to establish then to prejudice the oathes appointed to be taken, *by such vsuall and ordinary lawes Ecclesiasticall.*

I haue touched (afore in this second part) certeine cases where the Common law not only alloweth but also in some sort (about the other course) doth priuilege vnto courts ecclesiasticall the proceeding *ex officio* against crimes punishable by that iurisdiction. By that law the course of proceeding of office against crimes, is alwaies by the parties corporall oath vnto articles or positions of the very crime it selfe, so there be *fame, notoriousnesse of the fact, taking in the maner*, or any other matter sufficient in law, to open a way to such enquiry precedent. Now therefore further, that such enquiry is allowed to courts Ecclesiasticall, appeareth by two precedents of consultations set downe in the Register. The former of them mentioneth and alloweth of an *inquisition* made by the *deane of Yorke* his officer, and his proceeding thereupon, for the defects in an *Chancell*, and for wants of sundry ornaments and requisites in the Church. The other (beside a consultation) doth conteine also a commandement to the *Ordinary* to take full information, euen by way of *inquisition*, and by other meanes touching the value of tithes, & to certifie into the Chancery. Now all enquiry generally (as is shewed afore) is *ex officio* & by the oaths of men.

Register tit.  
consultationes.  
fol. 48. a.

Ibid. fol. 54. b.

Ibid. fol. 51. b.

Ibid. fol. 49. a.

But in particular, for proceeding of office, we finde there that an *Ordinary* proceeded *ex officio* against a parishioner for tithes detained by him, whiles a benefice was vacant. That it is allowed vnto them to proceed against crimes *ad correctionem anime*, we haue a precedent there of an *Ordinary* proceeding against a lay man for *usury*, at the instance of a party grieved.

That against crimes, defects and excesses, they may proceed and object articles euen *ex officio*, appeareth by the precedent there also set downe, where an *Ordinary* proceeded *ex officio* to the interdicting of

Ibid. fol. 51. b.



Ibid. fol. 43. b.

a Church, by reason a part of *Divine service* (as it was then holden) founded to be vsed in such Church, was withdrawn. Where an Ordinary proceeded *ex officio suo debito* to the correcting of the crimes and excesses of those that were vnder his iurisdiction, and among others, objected articles against a knight for not sufficient reparations of a Church, tending to the correction of his soule, by reason of his deteining of that which he ought not: this is there allowed to belong to the court Ecclesiasticall, and to the liberties of the Church. Likewise we there finde an *Ordinarie* dealing allowed, that proceeded *ex officio* against one that had laid violent hands vpon a clerke, so far as he dealt but for correction of the delinquent to the excommunicating of him and punishment of the sinne, without adjudging any amends to the partie wronged: for this belongeth to a Temporall court.

Ibid. fol. 50. a &amp; b.

Vpon a publike fame arisen, that a certaine parishioner did withhold his due oblations, refused to be confessed to the priest, and to receiue the Communion at least once a yere: the Ordinary *ex officio* did call him to the intent to inflict some corporall paine vpon him, for correction of his soule: and this proceeding is there allowed vnto Ordinaries, to be of their iurisdiction, and lawfull.

Ibid. fol. 54. b. &amp; 55. a.

One *Lundsey*, a publike Notary, being infamed as well of a *crime of fornication* by him, committed as for contempts done to that court, was *ex officio* proceeded against by the deane of the Arches, for correction of his soule and manners: both which are there allowed (together with such proceeding) to belong to the liberty of the Church and to Ecclesiasticall iurisdiction. In which precedent it is to be noted, that towards the end thereof, and in the title of it in the margent, this word *Defamationis* is vsed for the word *Fornicationis*: for actions of defamation be seldome or neuer sued *ex officio*, but at the instance of some party griued. Besides, mention is there made of committing it within that iurisdiction, which in defamation (that is not properly said to be committed) is not materiall, so the offender remaine in that iurisdiction: and therefore, where in the beginning of that writ, the words are printed, *Super formationis &c.* and *Conuerso* (which hath no sence, nor is any *Latine*) no doubt it ought to be, *Super crimine fornicationis &c. commissio.*

Ibid. fol. 45. a.

For the crime of *Fornication*, it is twice besides noted there, that Ordinaries proceeded in that forme. In the first whereof, it is said, that the Ordinary proceeded *ex officio debito* (as bound by his office and duty) against a chapleine that kept a concubine publicly, to the



the danger of his owne soule, and with scandall of others. Therefore this crime was objected against him *ex officio*, for his correction and reformation of his maners. In the latter, the Officiall of Canturburie proceeded *ex officio* against a vicar (for the same crime, and for some contempts also by him made against that court) *ad correctionem anime sue*. And there it is said of both the faults, as in all the former consultations, to like effect: that this is *cognitio spiritualis que ad forum Ecclesiasticum pertinet in premissis*, and therefore, *vobis significamus, quod in causis predictis ex officio vestro, quatenus ad correctionem anime ipsius vicarii, & non concernunt placita de catallis & debitis, in curia Christianitatis procedere, & ulterius ibidem pro salute anime sue statuere & facere poteritis, quod ad officium vestrum speciale noueritis de iure pertinere, prohibitionem nostram predictam non obstante.*

Ibid. fol. 57. b.

So that by these precedents of consultations it appeareth, that citations and proceeding against crimes &c. of that iurisdiction, by way of inquisition or enquire, and the objecting of them to the parties enquired of, *ex officio iuxta Canonicas sanctiones, ius, & libertatem Ecclesiasticam*, which is by oath, in matters as well *prohibita quia mala*, as *mala quia prohibita*: and against lay as well as Ecclesiasticall persons, are by the lawes of the land warranted and allowed vnto Ecclesiasticall courts. All which are gathered out of writs of Consultation, after that by the parties conuented prohibitions (vpon vntue suggestions) had bene brought to remooue the said causes from the Ecclesiasticall courts, and therefore no doubt but the parties delinquent were cited and proceeded with altogether against their willes. Besides, can any man be so simple, as once to imagine, that any that is cited to answer in a cause criminall, and to be punished or corrected for it, will willingly of himselfe appeare and answer, if he needed not to come at all, and were therein also by law protected?

In the statute *De excommunicato capiendo*, sundry grieuous crimes (being of Ecclesiasticall consufance) are reckoned vp. Thereby it is also provided that the *Significavit* from the Ordinary, must containe that the excommunication proceeded vpon some cause or contempt of some originall matter of some of the said crimes there mentioned. Now it is sure, that after apparance yeelded, no contempt can be committed but in not performing something that he is commanded according to that law: as in refusing to sweare, or being sworne, to answer as he ought. So that this statute leaueth the determination of all such contempts to the disposition of that law by which the proceeding is.

5. Eliz. cap. 23.

The practise of this oath was in the time of king Henrie the eight,



aswell after the papacy was ouerthrowen here, as afore, and so hath also continued euer since.

A. ft. & Mon. 2.  
edit. 2. rom.  
fol. 1495.

Ibid. fol. 1501.

Ibid. fol. 1511.

Ibid. fol. 1512.

Ibid. fol. 1516.

Ibid. fol. 1536.

Circa. 3. ant.  
4. regni D.  
El. Reginæ.

The lords of the councell finding *Boner*, then *bishop of London*, slacke in his duty, do enioyne him to call before him all refusers to come to diuine seruice, and to search out, conuent and punish all adulterers according to the Ecclesiasticall lawes. The kings commissioners visiting the church of *Paules*, did examine all them by vertue of their oath, of their doctrine & conuersation of life. Whereupon one *Iohn Painter* and others did confesse adultery by them committed. Yet this was a generall inquiry. The kings commission to proceed against *Boner*, affirmeth that the commissioners shall proceed aswell by meere office, as also by way of denunciation, and by either of them, or any other wayes and meanes by their discretions. By vertue whereof they charged him with a corporall oath *ex officio* in forme of law to answer the positions that should be ministred, which vpon his oath taken, were ministred to him: but for that he answered them not fully, he was pronounced *Contumax & pro confesso*. The proceedings about that time against *Steuens Gardiner*, and the oath ministred to him, was also *ex officio* in matters criminall and penall, as appeareth by the sentence of deprivation from his bishoprike of *Winchester*. Yet besides bishops, there were both some of the kings councell, *Ciuiltians*, and also some *Iudges* of the land, and common lawyers, commissioners in that cause, who knew the law as sufficiently as any that now impugneth this course. In her Maiesties time, that now is, a speciall commission was directed forth by her highnesse vnto certeine, to proceed by way of enquiry *ex officio*, against two great and honorable personages, in a cause of correction for incontinency: for so the commission did run. Whereupon they were accordingly called & proceeded with, and were put to answer the articles vpon their corporall oaths.

When *Doctor Grindall*, late *archbishop of Canturbury*, was *bishop of London*, he complained to the Lords and others of her Maiesties most honorable priuy councell, that by vertue of the commission Ecclesiasticall, he could not so duely and thorowly proceed to the discovery and punishment of certeine knights & other great possessioners being recusants (as he ought) because certeine *Ciuiltians* and common lawyers supposed to be likewise affected, did animate and aduise them not to take oath to answer to articles obiected *ex officio*, vnlesse some fame &c. by presentment or such like, were first found against them: which would prooue a long, troublesome, and chargeable course, if it should be pursued, seeing some of them dwelt in remote



remote places of the Realme, where the people also stood so affected, that they would neuer be induced to make any such presentment or discouerie: and that the matter was by vehement *presumptions* and *Evidence* giuen vnto the Commissioners, otherwise sufficiently detected, and made so notorious, as that by lawe they might ground an *Enquire of office* against them. For redresse whereof, and for furtherance of iustice, it pleased their honorable Lordships to call some both of the Ciuilians and common Lawyers afore them, that had giuen such aduise: and there were thereupon three of the Doctors, and one Counsellor at law, by them committed to the Fleet: as (I thinke) some of their honourable Lordships and others yet remaining, can remember.

How necessarie such oath is to be giuen, for the good of the Common-weale, sometimes euen vpon suspition conceived, without further detection: the late Proclamation set forth against that notable disorder of traficquing with the Leaguers and Rebels of *France*, may make more apparant. So that we may thus conclude this point: that such oath of the partie in some matter or crime that may be dammageable and penall vnto him, is both in practise, and is allowed also to be practised (in Courts Ecclesiasticall) by the lawes of this Realme.

14 Aprilis  
1591.33. Do.  
Reginz.

## CHAP. 15.

*That such oath is allowed both by Canon and Ciuill lawes, and howe farre: and that the like is established and thought equall by the lawes and customs of other nations.*



Seeing the giuing of an oath in a cause criminall and penall, is practised by the lawes of the Realme, and not disallowed by them vnto Courts Ecclesiasticall, in both which respects such Canons as prescribe it, are by statute warranted to be still vsed, as they were before the making of the Acte, and in truth haue bene alwaies since: let vs see whether this course be iustificable also by *Canon* and *Ciuill* lawes, and by them allowed and practised. For the lawes of the Realme that doe allowe certeine matters to be of Ecclesiasticall consufance, cannot be entended but to allowe an Ecclesiasticall forme of proceeding by such lawes receiued. And it were as vnreasonable to debarre them from an Ecclesiasticall forme of proceeding in a cause Ecclesiasticall, as to require of them to proceede, by enditements and Iuries.

These lawes are so plentifull in this point, as it were in vaine



to sette downe but a tenth part of that, which might be said. Therefore I hold it best to shewe vnto you what is the lawe herein (agreeable to the practise in Ordinarie Courts Ecclesiasticall) as I conceiue it, in as great briefnes as I can: which may both declare that by those lawes it is allowed, howe farre and why it is lawfull, and also serue to answere (by true distinction) vnto all obiections drawne out of either of those lawes.

An oath touching a criminall position or matter, is either to be taken by a witnesse, or by a partie. A witnesse (by the very nature of testimonie) must depose indifferently, as well for the partie against whome he is produced, as for him which produceth him: And therefore is to answere truely, not onely the positions and articles giuen in by him by whome he is produced, but also the lawfull and pertinent Interrogatories, ministred by the aduerse part. In which Interrogatories, two seuerall sortes of matters may be contained, tending to disable him, from giuing testimonie. The first is an Interrogatorie tending to the discouerie of his owne turpitude: and vnto this, whether it concerne any crime supposed by the witnesse to be committed, or his confession thereof, or the fame and infamie against him of such crime, or a sentence thereof, or an excommunication thereupon gone out against him, or any such like matter, he is not bound to answere vpon his oath, though he haue done penance for it, and thereby presumed to be reformed. The reason hereof is truly alleaged to be this, because the ende of such a criminous Interrogatorie ministred by way of exception or barre to a witnesse or an accuser, is onely to disable him from accusing or witnessing, and not to his acquittal or condemnation of the crime, as the ende is, where a Purgation of a mans owne selfe is to be enioyned, and therefore no reason to aske it of himselfe. The second sort of Interrogatories tending to the disabling of a witnesse, is such as containe no turpitude in themselves: as Interrogatories touching his condition, whether he be bond or free, or of his povertie, kindred and alliance, and such like, and to these, he is bound to answere.

If a Criminall matter objected, be to be answered by the partie to the suite: it either toucheth the crime of some witnesse by him produced, or the partie his owne crime. When it toucheth a crime of his owne witnesse, he must answere it in the vertue of that part of Iuramentum calumnie by him taken: which is, that he shall not burden (more then needes) his aduersarie in making his proofes, but shal himselfe confesse a truth, when he is asked.

When it toucheth the parties owne crime, it is of two diuerse considerations.

Felynus in c.  
cum causam  
de testibus nu.  
10 per comm.  
opinionem.

Io. Andr. in c.  
2. de confessis  
nu. 6. per c. ex  
tuarum de  
purgat. ca-  
non: & c.

Felyn. ibid. per  
Baldum.

Specul. de te-  
ste §. iam de  
interro-  
gat.



considerations also: either the cause is *Civily* mooved for the priuate interest of the prosecutor: or *Criminally*, for publike punishment. If the suite be but *Civily* mooved, the *criminosus* Position or Interrogatorie may concerne such a crime, as being concealed, brings benefite and commoditie to him, with another mans losse. And in this case (albeit there be no *detection* or *fame* precedent) he is bound to answer it by his oath. But if the concealing of such crime cannot procure his gaine with another mans losse, then is not the partie in such case bound to answer a position criminosus by his oath. Yet euen (b) in this case, if such crime bee notorious, or otherwise sufficiently discovered by fame, &c. he is bound to answer it by his oath.

If it be mooved *Criminally*, to the entent of publike punishment, it is either touching an hidden crime altogether, or a crime (in some sort) brought abroad and manifested. If it be simply hidden and secrete, (c) the rule is, that a man is not bound to answer such crime vpon his oath, *quia nemo tenetur propriam turpitudinem revelare*. And it (d) is alleaged out of *Chrysostome* in the *Decrees*: *non tibi dico ut se prodas in publicum, &c.*

*dudum el. 2. de electione. gl. & Innoc. ibi. Specul. tit. de Positionibus. nis regula secundum Decium. l. fin. C. de edendo. c. qualiter el. 1. de 2. q. 1. d. De poenitentia. dist. 1. c. quis aliquando. ibi: non tibi dico.*

One reason hereof is, (e) because secretes are not to be published, but to be left to God alone, *de occultis Ecclesia non iudicat*. Another reason is, that a Iudge may (f) not interrogate iudicially, but where he is led thereunto by good equitie: but there is none equitie to enquire of faultes that are absolutely secrete and hidden.

Yet there be also certeine cases excepted out of this rule. The (g) first is, when the crime is such, as doeth by lawe hinder the execution of his function, or the retaining of a benefice in an Ecclesiasticall person, as *Simonic*, *irregularitie*, or such like.

An example hereof also we haue in the olde Canons of Councils, where it was thus decreed. *Though he be otherwise a very good man, yet let not such be ordeined a Clerke, as is a solemne Penitent: viz. such as (for some crime) hath bene put to such grieuous and publike penance, as was vsuall in those straiter times. But if such happen to be ordeined through the Bishops want of knowledge of his state, let him be deposed from the Clergie, because at the time of his ordination, non se prodidit*



arg 23. q. 5. ca.  
p. odest. & de  
renuntiat. c. ni-  
si cum pridem

§. 1. & §.

propter con-  
scientiam.

Spec. ibidem.

6 Bartolin d. l.

Marcellus. nu.

3.

Specul. ibi-

dem & c. qua-

liter 2. extra. de

accusa. 22. q. 1.

c. si quis per

capillum.

Specul. ibi-

dem. nu. 42. &

43.

prodidit fuisse poenitentem, because he himselfe bewraied not so much: Then much more ought he to open it, vpon his oath. The reason that in all such thinges which hinder the execution of an Ecclesiasticall office, the partie is to answere (though it be otherwise secrete, or that he haue done penance for it) is this: because thereby his owne good and safetie of conscience is procured, least he should else wrongfully liue vpon, and spende that which by lawe and right belongs to another, & not to him. And this holdeth generally, whether the matter be ciuilly or criminally moued, wheresoeuer by concealing, the partie that is to answere, shall winne and gaine with some others losse, sauing when by such answere of the partie, some thing that was fully afore decided, is thereby called (a fresh) into question.

The seconde exception of that rule, touching not reuealing secrete faultes, is: whereas by concealing of the offence, great perill doeth growe to the Church: as in Heresie, and Dilapidating of an Ecclesiasticall liuing.

Likewise it may be saide of excommunication: but this is of two sortes. One is, *excommunicatio Canonis*, when the very lawe inflicteth that censure *ipso facto*: as by statute for fighting with drawne weapon in Church or Church-yard. Now because this censure so by lawe inflicted, is alwaies presumed to be iust, and to binde: therefore we are not bound by oath to answere to a position or Interrogatorie of our owne being excommunicated, no more then we are touching our secrete faultes. The second is *excommunicatio hominis*, when the censure is but decreed by the Iudge: which because it may be vniust (as being without good cause) or void and erroneous (as being decreed after an appellation made, &c.) therefore it doth not (necessarily) binde; and consequently ought to be answered by the parties oath.

But when a crime is manifested and discovered abroad, by some waies and meanes sufficient to ground an Enquire vpon, that are not yet prooued before the Iudge: then the Iudge is not to vrge the parties oath, vpon the crime it selfe: but yet he may require him to sweare, whether he beleue there be such an infamie runne of him, or whether he haue bene adiudged by sentence convicted of it, whether he haue at any time confessed it, or whether he beleue it to be *Notorious*. If he shall deny to take oath to answere to these of his credulitie: he doth thereby incurre contumacie, and may be proceeded against, as convicted thereof. One reason hereof is this: because he sinneth to charge his aduersarie or the Office, with prooffe of a matter of this nature, whereof he knoweth the trueth himselfe. Another rea-

son

arg c. 1. §.  
vnico  
de crimine  
falsi 10. q. 4. c.  
quisquis.



son is, for that he is not hereby accounted to bewray himselfe of any hidden fault: because these matters (by common entendement) are otherwise knowen sufficiently. And therefore it is but as an inducement for him to yeeld vnto further proceedings, if any of those afore-said, be in deede true against him.

Nowe, if the partie shall denie vpon his oath these aforesaide matters, whereof he is interrogated, then cannot the Iudge proceede to giue him an oath touching the trueth of the crime it selfe objected, vntill he haue made prooffe by witnesses that the partie is in deede thereof infamed, hath elsewhere confessed it, is conuicted thereof, or such like. But when they or any of them is so prooued, or by the partie himselfe confessed iudicially, then may the Iudge lawfully giue him an oath, touching the trueth of the very crime it selfe: to the intent (if the matter fall out true) the partie by due tokens of penitencie (to be enioyned him) may be reformed, the scandal and offence remooued, and others terrified from the like. The equitie hercof is manifest: for vpon such infamie running vpon him, and so prooued or confessed, he may be put to his oath with his cōpurgators: which is (a) much more, and harder for him to do, then to deliuer the trueth vpon his owne onely deposition: especially seeing no corporall punishment may be (vpon such Ordinaries proceeding) inflicted, but onely *salutaris pœnitentia*, tending to his amendment & reformation.

You are not to vnderstande that this compulsion, to take such oathes, is an absolute, simple, or precise compulsion, but onely causatiue, as Interpreters doe call it: that is to say, if he refuse to answer or to purge and cleare himselfe being infamed, and thereby scandalous for some fault, he is to be declared as conuicted, to be suspended, or otherwise to be proceeded against, as the qualitie of the cause requireth.

To prooue further, that by these lawes, an oath is appointed and may be ministred to the partie, in a cause criminall, I will onely (for auoiding of tediousnes) set downe the (b) places and quotations: *ff. de iureiur. l. 16. & 18. d. l. vlt. ff. de in litem iurando. l. 11. ff. de rei venditione. & passim alibi. l. vlt. C. de fidei iur. l. 1. C. de his qui ad Eccles. confugiunt. Iustitia. A. l. vlt. dem A. l. vlt. C. de iure dominij impetrando. Idem A. l. vlt. C. de pœna iud. qui male iudicauit. Auth. vt litigatores iurent. fin autem in fine. C. de bonis autor. iud. possidendis. l. pe. bonæ fidei. C. de rebus creditis & iureiurando. & ibi Apostilla. Nou. 8. const. 7. & ibidem glossæ & DD. l. 1. q. 3. c. quisquis. & ibidem q. vlt. c. 1. 35. q. 6. c. si duo. gl. in c. ex pœnitentibus. 2. q. 6. in toto. 6. q. 5. c. vlt. item in princ. cum c. sequ. 15. q. 5. & c. si quis de gradu. 4. & c. sequ. ex. de purga. Canonica. & c. 10. ibidem. c. præsentium 2. & præterea singillatim. cum sua gl. de testibus in 6.*

Speculibi-  
dem. nu. 42. &  
41.

Io. Andr. in c.  
dudum el. 2. de  
electione.

c. omnibus &  
c. presbyter. 2.  
q. 5. de purgat.  
Can. per totū.

arg. c. ex  
parte 3. de de-  
cimis. & c. per  
Venerabilem.

qui filij sint  
legitimi.

arg. l. de ætate  
ff. de interrog.

qui tacuit  
c. fin.

pœna  
de iura. ca-  
lumniz.

l. 13. idem  
anus

l. 1. ff. rerum amotarum. l. qui pe titorio  
strumentorum. Leo Aug. l. 6.

l. 1. c. de iure deliberandi. l. 1.  
A. Nou. const. 124. & Auth. nouo iure. C.

si verò l. cum apud veteres.

nult. C. de probationibus. l. in  
fin.

Nov. 8. const. 7. & ibidem glossæ  
& DD. l. 1. q. 3. c. quisquis. & ibidem q. vlt. c. 1. 35. q. 6. c. si duo. gl. in c. ex pœnitentibus. 2. q. 6. in toto.

6. q. 5. c. vlt. item in princ. cum c. sequ. 15. q. 5. & c. si quis de gradu. 4. & c. sequ. ex. de purga. Canonica. & c. 10. ibidem. c. præsentium 2. & præterea singillatim. cum sua gl. de testibus in 6.



and first out of the Ciuill (before the *Emperours* were *Christians*) and then after they were *Christians*, as they be reported in *Codice Iustiniani*; and then out of the *Canon* lawe, taken especially out of the ancient Fathers and Councils, that by perusal thereof (as your leasure may serue) you may discerne, vnto what member and part of the former distinction, they may seuerally be reduced.

l de arate 12.

qui tacuit.

ff. de inter.

c. si post. 2. de

confessis in 6.

c. fin. & ibi

DD. de iuram.

calumnie.

a Abb. in c. ve-

ritatis nu. 27.

de dolo &

contu.

b Gail. de pa-

ce publ. li. 2. c.

7. & est comm.

opinio per

Socin. Seniores in Lait

Prætor ff. de iurjurando.

Aranum & alios.

c. Clarus. lib. 5. §. fin. q. 63. per

Aratum & alios.

c. Sacramen-

tum &

cum datur.

de consuetu-

dine recti feu-

di.

Ord. Camere

Imper. titulo de Purgatione.

Imper. titulo de Purgatione.

Imper. titulo de Purgatione.

Imper. titulo de Purgatione.

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Imper. titulo de Purgatione.

Imper. titulo de Purgatione.

Imper. titulo de Purgatione.

Though it be but at the suite of a priuate person, if he that is iudicially interrogated will not answere at all, or doth answere obscurely and peruersely, he shall be holden *pro confesso*, and be condemned, no lesse then if he had confessed it, or vntuly denied it, because he contemneth the lawes, and the Magistrate. Likewise at a priuate persons suite and petition, the oath of *Iuramentum Calumnie*, *De veritate dicenda, & purgationis*, is giuen by the Iudge, and (a) must necessarily be taken by the partie, albeit the matter be criminall, or else he shall be taken as convicted. And when the *Accuser* hath prooued nothing (b) besides probabilities and presumptions, the Iudge is to minister vnto the partie conuicted an oath touching the truth of the crime, called *Iuramentum purgationis*. And this necessarie oath hath place in (c) all Temporal or Ciuil Courts abroad in the world, aswell as in Courts Ecclesiasticall.

Now if where a common person sueth, either for his owne priuate interest, or for reuenge, the Iudge (by the Ciuil law) may exact such necessarie oathes of the other partie, importing oftentimes discouerie of matters criminall and penall to himselfe: howe much more then may he and ought he to doe it, (after good presumptions and probabilities had,) where there is a publike interest growen vnto the Church or Common-weale, to haue the very trueth knowen, for reformation of the partie, and suppressing of the sinne or offence? By all which premised, we may see the equitie, necessitie, and true vse of such oathes by those two lawes, *Canon* and *Ciuil*.

Besides those lawes, it is also receiued and vsed by the Municipall and customarie lawes of many nations of *Christendome*. By the lawe *Feudal*, or (as we here speake) of *Tenures*, such oath hath vse in crimes. For if the objected crime be denied by the partie, and cannot sufficiently be prooued, he must haue 12. compurgators to sweare of their consciences and credulities for his cleering, after he himselfe haue taken the oath *de veritate vel falsitate ipsius criminis*. By the *Ordouances*

and



and customes of the Imperiall Chamber, seruing for all the Empire, the like oath is vsed; sauing that a Noble man is permitted to take it by his *Procurator*, authorised by him, to sweare in *animam suam*. By the Customes of *Hungarie*, there be many and long constitutions made, for the taking of it, and of the manner of this kinde of oath. It is testified (a) to be the common practise of all the seuerall dominions of *Italy*, that the partie conuented in Temporal Courts, whether by way of *Accusation* at the prosecution of another, or by way of *Enquirie ex officio Iudicis*, doeth sweare to declare the truth in all those things that shall be asked of him, euen of the crime it selfe: in which proceeding, their lawe is farre more grieuous and stricte, then is or may be vsed in Ecclesiasticall Courts, or any other in England: for at the suite of a partie, a man is not in an Ecclesiasticall Court to be sworne *de veritate ipsius criminis*, vntill he come to his *purgation*. The other point of greater rigour is, that they giue such an oath not onely where some lighter corporall punishment is to be inflicted (as in the *Starre Chamber* is vsed) but where it is capitall to the partie, or tendeth to the mutilation of limmes: a course not allowed by the lawes of this land. For merchandise to be carried out of the Realme of France, the merchant must make a declaration vnder his owne hand of the parties thereof, and the weight or measure, in what shippe, and whither he will carry it, and that there is no more, then is there sette downe, and that there be no deceitfull or forbidden merchandise there: and for the truth of such note or declaration, he must take an oath vpon the holie Euangelists. In other matters, Criminall, it is reported to bee the custome of France, for the partie onely to make faith when they are obiected, & hee is thereupon to answere, whether hee haue committed them or not: but he is not to take a Corporall oath. But by the Customes of *Normandy*, I finde, that the appealed of murder, or such like, (when it is to be tried by battaile) must vpon his oath (holding his aduersarie by the hand) solemnely sweare, whether he hath committed such facte or no, in the very selfe same wordes and manner, as *Stanford* (afore alleaged) affirmeth to be also the lawe of *England*, in like case. Generally, that to giue an oath to the partie conuented in a cause criminal to tel the truth, is the vsual practise of most Nations abroad, & that the common opinion of writers in those two lawes is, that it

Consuet. Hungar. de Iuram. Purgat. Marian. in c. qualiter qu. 84. Casonus in Pract. fol. 84. nu. 3.

Ordonnances du France liu. 2. tom. 2. tilre 14. du droit de refue, haut passage, &c. pag. 1195.

Matheus de Lion. 674.

Grand Coustumier. entre les coustumes de Normandie.

Bartol. in l. inter omnes. §. recte ff. de furtis.

b August. ad Angelum de maleficijs in ver. comparuerunt. Bertrandus consil. 321. nu. 3. li. 3. in prima parte. Marfil. in l. quæstio. habendæ nu. 73. ff. de quæstionibus. Conradus in Practica. fol. 280. & Gomez. ca. 1. Delictorum. nu. 65.



may be so giuen euen by the lawes *Ciuill*, (which is their *Common lawe*) doth appeare by the places of Authors, here quoted in the margent.

Ex Polluce  
Sigonius li. 4.  
ca. 4. de repub.  
Athenienſiu.

Amongst nations of farre elder times (in most flourishing *Common-weales*,) we finde oathes in all causes, whether *Ciuilly* or *Criminallly* mooued, to haue bene taken by the plaintifes, and also by the defendants. Amongst the *Athenians*, both parties tooke oathes, and besides that, did laye downe a certaine summe of money to be forfeited by him, that should be ouerthrowne. The plaintifes or *Accusers* oath was, that he would obiekt nothing but true crimes and matters. This was called *ἀστυμαχία*, and the defendant sware, that he would deale and answer plainly, not fraudulently or cautelously: and this was called *ἀντιμαχία*.

Aeschines cō-  
tra Timarchū.  
pag. 7. Græce.

When *Aeschines* accused *Timarchus* of a foule crime supposed to be done vpon him by one *Misgolas*, he saith thus: *that if Misgolas being called and urged to beare witnesse, shall denie it, so the intent to gratifie Timarchus: he shall thereby doe him no good, because Aeschines can prooue it by witnesses: but shall onely forswear himselfe, and withall shewe howe cunningly he can couer such villanies.* Whereby appeareth, that (in that *Common-wealth*) oathes might be giuen in matters criminall, tending to the opening of their owne turpitude, as well as of other mens.

Lex Seruilia  
Glauciz. apud  
Sigonium li. 2.  
ca. 6. de iudi-  
cija.

When the *Prætor* one of the chiefeſt Magistrates of *Rome*, had made choise of 450. Iudges, for deciding of causes: he was (by law) for his owne clearing to swear, that he had not wittingly chosen any of them *dolo malo*, viz. by fraude, mal engine, or for any sinister respect.

By all which the premisses out of the *Canon*, *Ciuill*, and the lawes and customes of other nations, may appeare, howe lawfull and equall a course it was holden (vpon sundry occasions) to vrge oathes, though some matter criminall in the partie himselfe, might perhaps thereby be disclosed.

CHAP.



## CHAP. 16.

That not onely by the word of God such an oath may be taken, but also being by the Magistrate duly commanded to be taken, ought not to be refused.



He innouators finding but small reliefe in the lawes (being rightly vnderstood) doe flee to the word of God, hoping therein (fall woorst that may) to be their owne iudges, and so to shroud their disobedience in refusing to be examined vpon oath, vnder a pretence of conscience, and of a religious care not to offend God thereby: and therefore they holde that they are by Gods law bound, not to answere (in that sort) vpon their oathes; which is more then if they had onely said, that they are not bound, and so at liberty either to answere or not. Whereby they would leaue a dangerous impression in the peoples mindes, that such lawes of the land (whereunto they are borne subiects and by which they are to be gouerned) may not be obeyed of Gods people with a safe conscience, as being contrary to the word of God. A pretence sure-ly to leaue vnto the scanning and determining of euery priuate subiect (how far he need to obey lawes) of most perillous consequence. As it commeth therefore orderly in this place, so is it also most fit to be discussed, whether the oath of the party in a case criminall and penall to himselfe, may be exacted and vrged by the Magistrate, without breach of Gods law: and consequently not to be refused by the subiect? It is said in Scripture, that euery soule must be subiect vnto the higher powers, for Rom. 13. v. 1. there is no power but of God, and the powers that be, are ordeined of God: 2. & 5. and therefore whosoener resisteth the power, resisteth the ordinance of God, and that they which resist, shall receiue to themselves iudgement: That we Tit. 3. v. 1. must be subiect, not because of wrath onely, but also for conscience sake. And we are commanded to be subiect to principalities and powers, and to be obedient. And to submit our selues 1. Pet. 2. v. 13. to all maner ordinance of man, v. z. publike gouernment, for the Lords sake. By which power, ordinance of man, or publike gouernment, are not onely vnderstood all kindes of magistracy and superior authority, and that we may not resist, do violence, or offer contempt to their persons; but much more, that we are to fulfill and obserue all their politike lawes, without wilfull breach of them, so they be not repugnant vnto Gods word. For if this happen, then that hath place, It is better to obey God Aa. Apost. then man. And if they command contrary things, we must remember that we cannot serue two such masters. Yet Gods word doth not abolish



abolish lawes, Common wealths, and euill policies, but doth establish them: therefore, except they which refuse to take such oath, can shew some direct prohibition, either expressed, or to be necessarily and immediately gathered out of Gods word against it, they must know, that their contempt and disobedience (in this behalfe) reacheth vnto God himselfe, whose ordinance both the magistrate and his lawes be.

For my part, I haue alwayes holden it a grosse error in Diuinitie, to affirme that a man may not holde any humane matter with a certeine perswasion, nor do any thing in externall humane actions, but such onely as we haue a positieue or affirmatiue warrant for in the word of God. For if this were a true position, then a man might beleeue no history to be true which is not in the Bible, no maxims or grounds of any sciences, nor common principles, lest known vnto vs by the light of nature (as that *two and two makes foure*) nor a man might not (with safe conscience) doe infinite many things permitted, and by humane lawes also commanded to be done: because all these histories and principles, and the most of these lawes be such, as can neuer by sound reason be positiuely and particularly prooued out of Scripture: but onely in this generality, that therefore they may be beleeued or done, because they are not contrariant to Scripture, and by the politike lawes of our countrey are receiued.

For who can giue any other sound reason, directly drawn from the Scripture, that theft shall be punished with death: that all matters of fact shall be tried by a lury of twelue, and sometimes not by witnesses, but by circumstances and probable inducements: that the eldest sonne shall carry away all the land from the rest of his brethren, though they be neuer so many: that my kinsman remooued (perhaps fiue or sixe degrees) descending of the whole bloud from my fathers brother, shall inherite my land before my fathers sonne by another wife: that at one and twenty yeeres a man may effectually sell his land, but not the day before, albeit he haue receiued my money: that the wrecke of the sea shall belong to the prince: that a stray proclaimed (according to law) after a yere and a day shall belong to the lord of the manour, where he was taken vp: with infinite such like?

Therefore it is no good and safe ground that the Innovators doe stand vpon, when as (being pressed to take such oath according to the lawes of the realme) they allege, that in conscience they may not doe it, because they finde no direct warrant for it by Scripture, whereupon



whereupon to stay their consciences. For if it were granted vnto them, that there be no commandements, no examples, no footsteps or traces thereof in Scriptures: yet if it be not by them prohibited or condemned, the generall obedience of subiects will tie them thereunto. But I purpose also to shew the lawfulnessse of it, euen positiuely out of the word of God: First, declaring that magistrates may lay vpon their subiects, oathes, necessarily by them to be taken: Then, that they may be taken in causes *criminall and penall* to the parties themselves: And lastly, I minde to answer the obiections that I finde brought to the contrary.

That when an oath is duely imposed, there is a necessity enioyned to take it, doth appeare by the commandement of God himselfe: *Thou shalt feare the Lord thy God, and serue him, and shalt sweare by his name.* Which words being dispositive, not onely to the maner of the oath, *vz. By Gods name*, but also to the action it selfe of *swea- ring*, doth argue euidently that there be oathes aswell *necessarie* as there be voluntary.

The like commandement is given by the Lord in the prophet *Jeremie*: *O Israel, thou shalt sweare, The Lord liveth, in truth, in iudgement, and in righteousness.* Wherein there is both a commandement of that action, and an instruction in what sort an oath is to be taken, and with what necessary adiuncts. In the charge that *Ioshua* gaue to all the Magistrates of *Israel*, *vz. to their Elders, to their heads, their Iudges, and their Officers*, this amongst other thinges is contained: *that they shall not make mention of the name of the Gods of the Nations, nor shall cause to sweare by them.* And therefore *Magistrates* haue authority to cause those that be vnder them, to sweare and to take oathes. For example of such charge given, we haue that of king *Saul*, who not onely charged the people with an oath, but made them *vow with a curse, not to eat any food that day, till night.* Therefore one of them reported to *Ianathan* *Saul's sonne*, that *his father had made the people to sweare.*

The most wise king *Salomon*, when he meant (for a punishment) to confine and imprison *Shimei* within the compasse of *Ierusalem*, for his reuilings of king *David*, telleth what he did vnto him: *Did I not make thee (saith he) to sweare by the Lord, and protested vnto thee, saying, &c. why then hast thou not kept the oath of the Lord, and the commandement wherewith I charged thee?* And yet this oath and promise was generall without exception of any necessary cause that might happen to occasion him to go out of the city: and therefore did bring danger

Deut. 6. v. 13.

Jerem. 4. v. 2.

Iosh. 23. v. 2.

Ver. 7.

1. Sam. 14.

v. 24 & 28.

1. Reg. 2. v. 42.

& 43.



Ibid. v. 39. &amp; 40

1. Sam. 24.

v. 22, 23.

1. Reg. cap. 8.

v. 31. &amp; 32.

2. Chron. 34.

v. 31. &amp; 32.

Ezra. cap. 10.

v. 5.

1. Esdr. Apocr.

cap. 8. v. 92, 93.

Ibid. v. 94. &amp; 95

Nehc. 5. v. 11,

12, &amp; 13.

danger to intangle him as deepe as his life. For albeit the cause which he had of going forth of the city might seeme something reasonable, in that *he went forth but to fetch home two of his servants, that had runne away from him*: yet did this breach of oath (wherewith the king had charged him most iustly) cost him his life. So king Saul vrged David to *swear vnto him, that he would not destroy his posterity after him.*

For a priuate offence and iniury onely betweene neighbour and neighbour, king Salomon testifieth, that a necessary oath of purgation may be required by the complainant, *when a man shall trespassse against his neighbour, and he lay vpon him an oath to cause him to swear, and the swearer shall come before thine altar in this house: then heare thou (O Lord) in heauen, and doe and iudge thy seruants, that thou condemne the wicked, to bring his way vpon his owne head, and iustifie the righteous, according to his righteousness.* Where we see that a priuate person vpon a supposed offence and trespassse against him, may vrge his aduersary vnto a necessary oath, albeit the matter be criminall and penall to him, if either he refuse it, or be otherwise conuicted. How much more then may a magistrate vrge it for the publike interest, and in an offence supposed to be done against the whole Common wealth?

King Iosias also meaning to reforme religion, and to restore the true worship of God, greatly then decayed; did make a *covenant and vow, and caused all that were found in Ierusalem and Benjamin, to stand to it.* So Ezra the Scribe (being also a Magistrate) caused the chiefe priests, the Levites and all Israel, to *swear that they would do according to this word.* Which oath, that by vertue of his office it was imposed necessarily on them, and not onely by them voluntarily taken, we haue good testimony out of the booke of *Esdras Apocryphall*, where that story is reported; for it is there said thus: *To thee it doeth apperteyne, and we are with thee to make thee strong.* Whereupon is added: *And he made them swear.* By which we may gather, that if any of them would not haue sworne vpon his commandement, they should haue bene compelled thereunto by some ciuill constraint.

When the richer sort of the *Leues* had receiued the lands of the poorer sort to morgage, which were forfeited vnto them; yea & their very sonnes & daughters were drawen into bondage for satisfaction of such things as they had borrowed for their necessary sustentation: *Nehemias caused the priests to swear to restore these againe, and to forgive the hundred part of the very principall due vnto them.* So that by the prenisses we see, that Magistrates may exact oathes of those that be vnder them, which ought not to be refused.

The



The next point is, that oathes may lawfully be taken, even in matters criminall and penall to him that taketh the oath. If an oath must be kept though it be to a mans owne hinderance and damage, then may it also be taken. For that which wee neede not keepe and may lawfully breake, was vnlawfull at first to be taken. But sundry oathes made though happely tending to our owne hinderance must be kept: for so it is commanded indefinitely and indistinctly by God: and it is assigned for a speciall marke of a godly man to sweare to his neighbour, and not to disappoynt him, though it bee to his owne hinderance. How much more then must it be kept, being commanded by a magistrate, then when it is made to a private person onely, and being by vertue of his obedience imposed, then when it is only voluntarily taken? And therefore being to be kept, may also lawfully be taken. Abraham said thus vnto his seruants: *I will make thee sweare by the Lord God of the heauens, and of the earth, that thou shalt not take a wife vnto my sonne of the daughters of the Canaanites.* Whereby appeareth that a superiour may cause him that is vnder him to sweare to doe his endeouore, in a priuate matter appertaining to him: much more therefore may a publike magistrate cause those that be vnder him to sweare touching a matter wherein the whole common wealth hath interest to haue it sincerely dealt in. When *Esa* was greatly distressed by famine, so that he was almost dead: *Jacob* moued him to the sale of his birthright, & to take an oath for confirmation of it: & the right continued thereby ratified vnto *Jacob*, which argueth that an oath may be kept and shall stand, euen where he that sweareth is thereby greatly endammaged and preiudiced.

We are forbidden to *speak vnto truth, or to lie one vnto another*, euen in priuate affaires amongs our selues, and are commanded not onely to cast off lying, but also to *speak the truth every one to his neighbour, because we are members one of another.* Signifying thereby, that in all things this is to be done, where it is expedient for our neighbour, and hee hath interest to knowe the very truth. How much more then, ought we to tell and manifest a truth, being commanded by a publike magistrate for a common benefite, seeing we are all members of one common wealth, and of the Church, howsoeuer it may turne to our owne priuate damage or of our friends.

Where a man is supposed to haue borne false witness against another, and is therof brought into question: the law of God appointeth the men which shall sit together, to stand before the Lord, euen before the Priestes and the Iudges which shall bee in those dayes: and the Iudges shall



shall make diligent Inquisition: and if the witnesse bee founde false, and  
 hath giuen false witnesse against his brother, then shall ye (saith God) doe  
 vnto him, as he hath thought to doe vnto his brother. Nowe, how can this  
 diligent inquisition be made, or the witnesse by any possibilitie or like-  
 lyhoode be euer found false, but by examination of him againe (as  
 Daniel did with the two Elders) touching euery circumstance for  
 the boling forth of the truth? for it cannot be imagined, that moe  
 witnesses may bee had in euery matter of perurie able to depose the  
 flat contrary? But because the matter is criminall to condemne him  
 of perurie, and very penall (euen as deepe as the punishment of  
 the other shoulde haue bene if the matter had bene founde true)  
 If it bee sayde, that the supposed false witnesse therefore might not  
 bee vrged to answer his reexamination vpon his oath: then by like  
 reason may he not be vrged to answer, either yea or nay to any que-  
 stion at all thesabouts. For if the question demanded be true, it is  
 no more lawfull for him to denie it without oath, then it is with oath.  
 And what cause (I pray) haue the *Iudges* of that *Inquisition*, to be-  
 leue him vpon his owne bare word (if he list to answer at al, which  
 is, to doe more then by the Innouatours is thought needefull) whose  
 oath they haue very iust occasion to suspect, and do therefore make  
 inquisition against the truth of his first oath? So that hereof it must  
 needes (by due consequence of reason) be gathered, that a man may  
 not vnlawfully be examined vpon his oath, in a matter criminall, of  
 his owne turpitude, and very penal vnto himselfe.

1. Cor. 10.  
 ver. 31.

Furthermore we are bound to doe all to the glory of God: but it be-  
 longeth to the glory of God, for a man (by due presumptions) su-  
 spected of a crime, to confesse of himselfe, as appeareth by the histo-  
 rie of *Achis*. For albeit the lot fell vpon him, yet was this nothing but  
 an inducement to ground a speciall *Inquisition* against him, being de-  
 tected by the generall *Enquiry* afore made. For if hereupon onely he  
 might haue bene executed (because the discouery by lot was by di-  
 uine prouidence directed to fall vpon him) then *Ioshua* needed not to  
 haue required any further confession of him. But hee doth not rest  
 here, but goeth further with a most solemne adiuration (in those daies  
 vsed for an oath, the *Hebrew* word signifying both, and translated  
 sometimes *inramentum*, & sometimes *adiuratio*) in this maner: *sonne,*  
*gine glory to the Lord God of Israel, and make confession vnto him, & shew*  
*me now, what thou hast done?* vrging him vpon this generall detection  
 by lotte, to a particular confession of the hidden crime & the circum-  
 stances thereof, albeit the punishment of it was capitall.

Leuit. 5. ver. 1.  
 Iosu. 7. ver. 19.

Whereby



Whereby is argued more strongly, that where by *facts* or other good *presumptions* & *evidence* a man is detected of crimes most secret afore: there the *Magistrate* may exact the parties owne confessions: especially where it is not so penal as either life or limme next may be gathered, that to confesse to a *Magistrate* (in such case) is to confesse to God. thirdly, that to make such confession to God, is to glorifie him, and lastly, that in like cases, the partie is bounde to disclose the particular circumstances, though perhaps he be not severally and in particular interrogated of every one: for it is there said, *shew me now, what thou hast done*. Whereupon *Achan* touched in conscience, and knowing his duty to the *Magistrate*, confessed his fault with all the particularities thereof. If this were vpon his oath, then may an oath be vrged in a matter criminal and very penall to the partie: If he thus confessed and was bound so to do though it were without oath, how much more, when the partie is tied by an oath giuen by the *Magistrate*, as lawfully it is proved he may doe.

In *Leuiticus* a sacrifice is appointed to be made for certaine finnes, *Leuit. 5. ver. 1.* amongst which this is one, according as *Arias Montanus* doth *verbatim* translate it forth of the *Hebrew*. And if a soule or a man shall haue sinned, and haue heard the voyce of an *Admonition* or *Oath*, and be a witnesse either hath seene it or doth knowe it; if he doe not reueile it, he shal beare his own iniquitie. That which is here said, If he haue heard the voyce of an oath, the *Geneua* translation vttereth in the margent (as neerer to the *Hebrew* then the other in that text) thus: If the Iudge hath taken an oath of any other. If this be the meaning, then hereby we are bound to reueile what we haue seene or knowen touching that, which the Iudge seeketh to finde out by another mans oath, though we be not at all pressed to speake therein: much more ought we then to tell what we knowe or haue seene touching the matter, when we are so commanded by the Iudge.

*S. Augustine* seemeth to restraime it to this case: yz. where a man heareth another sweare and depose falsely, this (saith he) that place seemeth to say, that a man sinneth who heareth another sweare some thing that he knowes to be false, if he hold his peace. But he is then said to know, either when he was a witnesse of the matter deposed of, or did see it, or was priue to it, that is, did by any meanes know it as either by seeing it, or by hearing him speake of it, that now he sweareth otherwise. So that hee leaueth it at large to extend either vnto oathes falsely taken before a *Magistrate*, or priuately, or howe els soeuer.

*Iunius* in his last Annotations, vpon this Chapter, restraineth



neeth it onely vnto such vaine and rash oathes, as men sweare extra-  
iudicially: making him that heareth another so sweare, without  
reprehending him, to be guiltie of sinne himselfe, as no doubt hee is.  
But surely this interpretation of his cannot be grounded of this place:  
at least the place cannot (by any meanes) be onely restrained vnto  
this case. For the *matter* concerning which a man heareth another  
sweare, is the thing here principally considerable, and not the very  
oath it selfe: because it is not only sayd: If *a man heare the voyce of an  
oath*, but it is also added (as most material) *Et ipse testis vidit vel sci-  
uit, Which matter he as a witness hath seene, or otherwise by some meanes  
hath knowledge of, if he shall not declare it or reueile it, he shall beare his  
owne iniquitie and sinne.* Therefore it is the matter which the by-stand-  
er is able to witness of (by reason of his sight or some other  
meanes of knowing it) that (for the auoyding of sinne) must be  
declared.

Againe, if it were onely meant of him, that heareth another blas-  
pheme or vainely and falsly sweare, and doth not reprehend and re-  
buke him for it: then coulde not the Verbe of *declaring* haue bene  
vsed, but rather some word of rebuke and reprehension. Thirdly, if it  
were meant onely of the act of swearing that is not rebuked, then  
needed no mention to haue bene made of any other *sense* but of *Hea-  
ring* onely. But we see, that there is mentioned *Seeing*, and also (with  
a disiunctiue) any other meanes of *knowing* it, besides *hearing* of the  
oath: and therefore that sense which *Iunius* giueth cannot (possibly)  
be the very true meaning of this place. Nay *Iunius* himselfe in his first  
Annotations confesseth, that the most doe holde that it ought to  
be vnderstoode thus: that he sinneth who heareth an oath giuen to  
another man touching any matter whereof hee hath knowledge, if  
he doe not therein disclose what he knoweth. So that whether the  
other depose vainely, falsly or not, is not here spoken of or to be at-  
tended: but whether a man conceale his knowledge of a matter in  
question, that is conuenient to be knowen vnto a Iudge: for it is hee  
that hath authoritie to vse the *voyce of an oath* or of that adiuration  
or charge vnto another, which is here spoken of.

By this sense hereof, giuen by the most, and flowing easily from  
the very words themselues, may be gathered: that an oath may be  
giuen to the party enquired of indefinitely, as the Iudge (according  
to law) shall thinke good to proceede, euen before any witnesses be  
produced against the partie: that this voyce of an oath and charge to  
sweare, may bee giuen, before it be knowen whether any, or what  
witnesses



witnesses can testifie therein: and that a man knowing a truth touching a matter, whereof any other is enquired of by oath, ought (for auoyding of sinne) to testifie and to declare his knowledge therein.

Yet because in that place no mention is expressly made of any other person but of him that *heareth such oath*, who also *hath seene or knowne* some thing, and who is to *declare and reueile* it, or els to *bear his owne sinne*: therefore it is also (very probably) by some taken, and vnderstoode: when a mans owne selfe is adured or charged by the *Magistrate* to take oath. For the person of the *Magistrate* or some other must needs be vnderstood besides, though none be expressed, because it is sayde: *If a man haue heard the voyce of an oath*, whereby another person then the hearer him selfe is necessarily implied.

And then out of this interpretation doth follow: that (without sinne) a man cannot but testifie both against another enquired of, for it is said: *Whether he haue seene*, and against himselfe, (if he be required) for it is said: *or haue knowne of it*: which may as properly be referred to a mans owne fact, as to any other mans: because a man is least ignorant of his owne. And both by this & the former acception of this place doth it follow, that the *Magistrate* may lawfully tender and vrge such oath, because the partie *shal bear his owne sinne*, for *hearing the voyce of an oath* giuen, and not *reueiling his knowledge* in that matter.

*When a man doth deliuer of trust to be kept by his neighbour money or stuffe*, if it be embeseled away and therefore thought to be stollen, *Exod. 22. ver. 7. & 8.* *if the thiefe bee not certainly knowne or founde*: the man to whome they were so deliuered *in deposito* though hee had nothing for his paines, nor there bee no presumptions against him that hee hath withdrawen it: yet (by the lawe of God) must hee take a necessary oath of *Purgation* and *Enquiry* at the other mans onely suspicion *before the Iudges*: not onely that it is *stollen* (which might iustly perhaps bee doubted) but also *whether hee himselfe hath put his hand* (that is, by any direct or indirect meanes fraudulently dealt) *touching his neighbours sayde goods or no*? The same lawe is also a little after established by God touching any quicke goods left *in Deposito*. *Ibidem. ver. 10. & 11.* For if a man deliuer unto his neighbour to keepe, *Asses or Oxen, or Sheepe, or any beast*, and it die or be hurt, or taken away by enemies, and no man see it: *An oath of the Lord shall bee betweene them twaine, that he hath not put his hand vnto his neighbours good, and the owner of it*



shall take the oath, and he shall not make it good. Where appeareth that vpon the mutuall suspicion onely of the one against the other, both the parties are to take such oath: which though it do tend to the discovery of a mans owne shame, dishonestie, fraude and damage (if he be guiltie) yet is he of necessitie to take it, or els to be holden *pro confesso & cōuicto*, & is so wel allowed also to be giuen by the Iudges and to be taken by y parties, that it is there called *an oath of the Lord*.

Leuiticus. 6.

ver. 2, 3, 4, & 5.

Nowe that hee must necessarily take such oath, though the cause be *Criminall*, and he in trueth guiltie thereof, (so that hee must either discover his owne turpitude, or els be sinfully forsworne) doth plainly appeare in *Leuiticus*, where a sacrifice of attonement for such a sinne of *periuurie* is prescribed, besides the satisfaction of the partie wronged. *If any doe sinne (saith the Lord) and denie vnto his neighbour, that which was taken him to keepe, or that which was put to him of trust, or doth by robbery, or by violence appresse his neighbour, or hath found that which was lost, and denieth it, and sweareth falsly: for any of these things that a man doth, wherein he sinneth: when (I say) he thus sinneth and trespasseth, hee shall then restore the robbery &c.* So that hereby appeareth, that in many and sundrie criminal matters euen of his owne turpitude, such as be *prohibita quia mala*, a man may be vrged to a necessary oath. For there could neuer be danger in a matter secretly carried either of bewraying a mans selfe to his owne shame and losse, or els of forswearing himselfe, as is noted by this place, if he might safely, nay if he were bound in conscience to doe (as these Innouators now pretend & practise) v. if he might refuse to answer directly & particularly to any thing criminal that is asked of him, either with oath or without oath, but put it ouer to be proued by witnesses.

Nowe seeing by the equitie of Gods lawe in a matter criminall, and of a mans owne turpitude, he may be examined and must necessarily answer by oath, or els bee holden convicted, euen vpon a priuate mans suspicion onely, seeking therein but for his particular interest and satisfaction: then how much more vpon sound and good detections and presumptions, may this be vrged by a Magistrate, and ought not to be denied by the subiect, where the common tranquillitie of an whole *Christian* state is sought, and the parties owne reformation by due correction, concurring besides with the lawes of the land, that requireth this part of obedience in all subiects?

Num. 5. ver. 14

*If a man be moued with a Ielous minde, or (as the Hebrewes vttereth it) If the spirit of Ielousie come vpon him, so that he is Ielous ouer his wife that (perhaps) is defiled: or if he haue a ielous minde, so that he is ielous*

*ouer*



ouer his wife which is not defiled, & so the matter doubtfull: then, the Lord Ibid. ver. 13.  
 in such case appointeth, that the man shall bring his wife to the Priest &c. Ibid. ver. 15.  
 And the Priest shall charge her by an oath, and say vnto the woman: If no Ibid. ver. 19,  
 man haue lien with thee, neither thou hast turned to uncleanness from 20, 21, & 22.  
 thine husband, be free from this bitter and cursed water. But if thou hast  
 turned from thine husband, and so art defiled, and some man hath lien with  
 thee besides thine husband, (then the Priest shall charge the woman with  
 an oath of cursing) and he shall say vnto her, The Lord make thee to be ac-  
 cursed, and detestable for the oath, among thy people, and the Lord cause  
 thy thigh to rotte, and thy belly to swell: and that this cursed water may goe  
 into thy bowels, to cause thy belly to swell, and thy thigh to rotte: then the  
 woman shall answer, Amen, Amen.

By which course I obserue to the purpose in handling, y this strait  
 Enquiry most dangerous both to the body and soule of the woman,  
 if she sweare falsely, is grounded but vpon the only Ielous suspicion of  
 her husband: that it is in a crime capitall to her, if she be guiltie and  
 shall choose to confesse it, rather then to forswear her selfe (with ha-  
 zard of soule and of a most lothsome death of the body) for an adul-  
 teresse (by the same lawe) was to be stoned to death: and that it is of  
 great turpitude to her, and is *prohibitum quia malum*: and lastly, that  
 it is in a hidden & secret crime *in se* euen of his own nature in ge-  
 neral. For the slender remnants of honest and vnhonest left euen to  
 the very reprobate since the fall of our first parent, doth remoue this  
 action (euen where it may be lawfully committed) from the sight and  
 knowledge of others so much as may be. And in this place it is hid- Ibid. ver. 13.  
 den and secret *ex ipsa hypothesis*: because the case is part, where there  
 neither be witnesse, nor she taken with the maner, and yet the husband  
 hath her in ielousie. So that if God in his diuine wisdom founde it  
 equal & iust for satisfaction only of the strange humor of ielousie, not  
 only (vpon paine of conuiction) to make her vnder take so perilous a  
 kind of *purgation*, but also to charge her by an oath & a curse most so-  
 lemnly to declare y truth in a crime of this quality & consequence to  
 her life: how can the wisdom of those that challenge oathes of farre  
 more apparant equitie in diuers points noted, stand so opposite to the  
 wisdom of an whole realme in many ages, being so strongly warran-  
 ted by the wisdom of God in this & the former iudicials seruing for  
 the gouernance of his owne peculiar people? The examples also of  
 godly men reported in Scriptures, do sufficiently condemn y froward  
 (disobedient & refusers of oaths in these daies. For being asked some-  
 times particular questions dangerous to themselves (if they had not  
 stood



stoode cleare) and sometimes charged (euen in generalitie) to answer what should be demaunded of them, they vsed not any such friuolous tergiversations and euasions, as this sort of people and as Seminarie Priestes do: that is to say, Let me know euey poynt afore that you will aske mee, and then I will tell you what I will doe: or I will answer so farre as I am bounde by lawe and by a good conscience, whereof I my selfe will bee Iudge: or I will not sweare to accuse my selfe or my brother, for that is contrary to charitie: or where bee mine accusers, let them stand forth: or if you haue any thing against me, proue it by witnesses, with such like a number.

Jerem. 38.  
ver. 14, 15.

When the *Prophet Ieremie* was charged by the King (as it were vpon his allegiance) to answer that which he woulde aske him, he stood not vpon refusall till he might knowe what it was, but made this doubt onely, whether if he tolde trueth, the king would not kill him. Which when the king had promised he would not, then *Ieremie* condescended to answer what he would demaund of him: signifying that being so asked by a Magistrate, if it were not a matter capitall vnto him, he ought and would discouer it. If this were done vpon an oath, then must we doe the like, in the like case also. If hee did yeeld to tell the trueth without oath, then much the rather would he haue done it vpon his oath, and so ought wee being so deeply charged. But this question so generally propounded might haue bene of a matter both Criminall and Penall vnto him and others.

Jerem. 37.  
ver. 13. & 14.

When the same prophet was charged with a particular crime of his intended defection & fleeing to the *Chaldeans*, by *Irijah* a chiefe officer sitting Iudicially in the gate of *Beniamin*: he did not refuse directly to answer, by putting him to proue it by witnesses, or any such like dilatory: but answereth roundly and truely in the very contradictorie (as it were ioyning issue with him) and saith: *That is false, I flee not to the Chaldeans*. Now if the Prophet had bene guiltie, would he haue falsely denied it, or haue made any shifts to auoyde it thinke yee? or woulde hee say vntuely being vnsworne, more then being sworne? I thinke no man will so imagine of the holy Prophet: and therefore (by his example) a Magistrate in authoritie must bee directly dealt with in questions that hee shall aske, whether vpon oath or without oath, albeit the matter be criminall (as it was in this case) vnto the partie interrogated.

Act. Apost.  
c. 24, 25, & 26.

Likewise *S. Paul* in all his seuerall conuentings before authoritie mentioned in the *Acts* (euen at the suite and accusation of a partie) refused not particularly & truely to answer to all that was objected, by



by confessing some, and denying other some of the crimes, by his aduersaries and accusers imputed to him. But if he had learned the ready way that is now deuised, not onely to answer accusers objections, but the magistrates owne questions, he might haue wiped them off quickly (without such long *apologies*) and haue willed them only to prooue that they said: yet neither expressly affirming nor denying any thing. No doubt, if the Apostle had beene guilty of any thing (being duely asked) he would not haue stood mute, or haue answered doubtfully, neither would haue affirmed more without it, then he would haue done vpon his oath, if the course of that proceeding with him, had admitted and required his owne oath.

So that we may conclude this place, that this oath in a criminall matter, tendered by one in authority, being warranted by the politike lawes of the Realme, ought not to be refused, except there were direct prohibition thereof by the law of God: but least of all, may it (without the wilfull sinne of disobedience against the ordinance of God) be refused by any, being so manifoldly thus approoued vnto vs, euen positiuely by the holy Scriptures, in euery of the points afore challenged.

CHAP. 17.

*Some severall opinions of the Innouators against the parties taking of oaths in criminall causes, with answers to their reasons and objections.*



Against the ministring and taking of this oath by a mans owne selfe, the Innouators do holde sundry opinions, and do make many objections & arguments, meet to be viewed and briefly answered. It may not be looked for, that I should touch them all, because not many of them are come to mine hands, neither (if they were) will leisure serue, nor if it would serue, were it woorth the while, they be so friuolous; but especially, because their conceits and opinions (in this behalfe) are so manifolde, variable, & intricated with such contradictions one against another, and of the same man against himselfe, as (I do assure you) it is a worke of more labour to set downe (certainly) what they hold about this matter, then to confute them. But such is it meet that errors should be: diuided into many heads, hissing one against another; howsoeuer they betied together by the tailes, like *Sampsons* foxes, to set both Church & Common wealth on fire. So neere as I can collect them, their opinions



1. Cor. 4. v. 5.

be of foure sorts: The first are of those, that being required to take such oath truly to answer the matters wherof they be brought into question (the chiefe heads whereof are made known first vnto the) will answer neither yea nor nay, either touching the truth of the matters, or what they resolve to doe, but onely thus: If you haue matters against me that be manifest, then proceed to prooue them by witnesses: If they be hidden, then tarry till the Lord come, who will lighten things that are hidden in darkenesse, and make the counsels of the hearts manifest: and these commonly will also call for an accuser. And if it be tolde them that the common voice, the office, or the publike interest is their accuser that brings them into question, then come they againe to the first point, and bidde their accusers and their witnesses come and stand forth against them.

This dealing, as it is most peremptory and frantike of all the rest, so is it most vnreasonable and dangerous; for it tendeth to the taking away of all iudiciall courses both criminal and ciuill. To what purpose should a man produce witnesses, before the defendant hath answered directly what he confesseth, and what he denieth, and would haue prooued? Neither is this to deale sincerely, iustly, and vprightly, as we would haue others to deale with vs. For we should speake the truth one to another, and not seeke to circumuent any by cauels and frustratory shifts; but least of all in matter of iudgement: where, by law and by the Magistrate (that is, *Lex loquens*) we are required, and are in conscience also bound to procure, that controuersies doubtfull may be composed with least adoe & trouble that may be, to the intent that which is right and truth in euery cause (expedient to be known) may quickly appeare and come to light. Such froward answers as this is, do rather put off the Iudge with contempt then yeeld any reason why such oath should be refused.

This pretended *dilemma* hath many *media* or meanes to make it easie to be dissolued: First, a crime may be so manifest, that the supposed offender becomes thereby greatly noted, infamed & scandalous, and therefore fit to be enquired of, albeit happely the thing be done so couertly, or of his owne nature be so hidden, as it can not be prooued by witnesses. For wicked and lewd persons make all prouision that may be, that there be no witnesses of their wickednesse: and therefore it is meet, that (being probably roused) that witness *instar omnium* be vsed and called on by them, who knoweth all things, and before whom the whole world stands, as a sea of pure Crystill. Some examples of such crimes are shewed in the chapter next afore, by the Scriptures.



tures. And what shall witnesses need, if he will not denie it? or what if the witnesses be not meet to be knowen at first, least the party discover no more (when he once knoweth them) then he supposeth by them can be depofed? or what if (at the parties first conuening) none be knowen in particular that can witness, but doe come afterward to the Iudges knowledge?

Touching hidden crimes (if they be simply hidden as is meant by that place, and by the like rules in law) it is very true, that they are not to be enquired after by any magistrate, neither is any man bound to reueile such: therefore it may not be asked by any man (as was done in *Papish* shrift) what faults and finnes he knoweth by himselfe. Such be the *counsels* and secret thoughts of mens hearts, spoken of by *S. Paul* in that place, and all actions also, not come abroad at all, or manifested, either by *fame* or other good *presumptions* or *evidences*: for before they be at least so manifested, it is not of any possibility to make any *enquiry* or question after a particular crime, when it is not so much as supposed to be done. Concerning which crimes, what the law Ecclesiasticall & practise is, I referre you to the *fifteenth chapter* of this second part. But if they shall be once so manifested abroad (as is before declared) then is not the fault *simple* hidden, but in part is manifested and brought to light; and therefore fit and conuenient that the party be either cleared of it, or corrected for it.

Besides, that place of *S. Paul* is not meant of any iudiciall proceedings, but of priuate, rash, and vncharitable iudging of our brother (in the worst part) without any iust ground thereof, as if we would take vpon vs Gods office, and to iudge the inward cogitations of his heart. Such peruerse iudging, our Saviour *Christ* also condemneth in *Math. 7. v. 1.* the Gospel: but it pertaineth nothing to such *enquiry by oath*, as the *Rom. 2. v. 1.* *Magistrate* hath good *enducements* and *presumptions* for to enter into.

Another sort, no lesse pernicious then the former, are those, who will pretend not to refuse to take an oath in a cause *criminall*: but yet they will do it with this limitation and protestation, that they intend not thereby to be bound, either to accuse themselves or their brethren: By *accusation*, meaning the reueiling of any thing, for which they or their brethren may be troubled or punished. Vpon what ground, other then the generall reasons of the rest, and of the *Iesuits* (as that it is against nature and charity, &c.) these should build this opinion, I (for my part) can not well coniecture: but it sorteth to this passe, that seeing we are all brethren, and members one of another, therefore it shall not be lawfull for the *Magistrate* to punish any



sinne or transgression, sauing where himselfe doth take the offender with the maner: yea, and scarce then to: for they will hardly (I beleue) allow, that the same man shall be *accuser*, *witnesse*, and *Iudge*. This plainly followeth of it, because no sinne may lawfully be punished, but where the party is conuicted: there can be none other conuiction, but either by the parties owne confession, or vpon depositions of witnesses: so that if no *Christian* be bound, nor ought (before a *Magistrate*) to reueile either his owne or his brothers offences, then doth it follow, that crimes shall neuer be punished, till the offenders themselues (being moued in conscience, if happely they shall euen then by these men be suffered to *accuse* themselues) shall willingly come in, and desire (for Gods sake) to be hanged vp, or otherwise punished, as the quality of their offence leadeth. Amongst the heathens, I reade of no nation, but they vsed, and had oaths in great estimation and necessary practise, sauing onely the foolish *Phrygians* (that wholly condemned them) and amongst *Christians*, the olde heretikes *Manichees*, of latter times the *Anabaptists*, and now these fellows: who (albeit not in plaine words) yet in very deed do (vpon the matter) take away all oaths in matters *criminall*, and consequently all, both *civill* and *ecclesiasticall* punishments and censures, from among men.

Alex. ab Alex.  
Genial. Dierū.  
lib. 5. cap. 10.

The third sort of opinions (being deliuered by diuers of the more learned sort of the *Innouatours*) are of such as holde that they may reueile both their owne and their brothers *crimes and offences*, to *remove euill from the land* (as they speake) when they are duely charged thereunto by oath. But such things committed either by them or their brethren, as albeit they beleue them to be well and lawfully done, yet if (either by law or iniquity of the time) they may bring trouble and punishment vpon them: those (they say) that they are bound in conscience not to declare at all. This opinion for the first part thereof, is directly contrary to the next afore precedent.

But who shall iudge, whether such matters as they be enquired of, be to be accounted faults and offences, which being punished, will *remove euill from the land*, or whether they be (in deed & truth) good and vertuous actions? Truly these men will not in this point be overruled, neither by the *lawes* of the realme, nor by the *Magistrates* and *Iudges* that be appointed to be interpreters of the lawes. But (no remedy) an oath they will not take, till they shall be satisfied and resolved (which they can make as long in doing as theselves list) that such actions be iustly and lawfully to be condemned as crimes & offences

by



by Gods lawe. So that this is nothing else, then to permit vnto euery priuate subiect the iudgement how farre, in what causes, and against whome, he neede to declare his knowledge of any matter: howe expedient soeuer for her Maiestie, and the whole Common-wealth, it be to be knowen. Is not this to put a sure buckler into the handes of *Iesuites*, other traitors, murderers, felons, and euery lewde companion, to holde faith against the lawfull examination of *Magistrates*, touching themselves and their complices? For if they neede not declare any thing by oath, much lesse neede they haue conscience to do it when they are not sworne, as in examination of crimes (that be capital to the partie examined,) is alwaies obserued in this Realme.

Perhaps vnto this absurditie following of their opinion, it will be saide, that those rehearsed are knowen and manifest crimes to all men, euen by the light of nature, but so are not their disciplinarie and *Synodicall* constitutions. It is true, that *treason*, *murder*, *theft*, and such like, ~~is diuine~~ in their generall nature, are condemned for crimes by all men: Yet when men come *ad iudicium*, to the particular application of their owne factes vnto the generall crime, they are then contented to flatter with their consciences, and to please themselves in their owne actions, and so with such and such circumstances, to denye theirs to be in any like degree. Doe the *Iesuites* (thinke ye) when they are conuicted, condemne their lewde disguised seducing of her *Maiesties* subiects, as treasonable? Did the damnable conspirators with *Babington* the traitor, (albeit they were not ignorant what the lawes of the lande did adiudge of their actions) when they went about their treasons, condemne themselves as traitors, and not rather lewdely flatter themselves vpon some circumstances, which they thought should assoile them of all guilt afore God? Therefore this opinion, though it carry some colourable shewe of some greater desire of obedience: yet when the reckoning is cast vp, it iumpeth in deede with the second. For it commeth to this point, that euery man shall be his owne Iudge, howe farre he neede to obey lawes and *Magistrates*, that require him to deliuer his knowledge, touching his owne or other mens factes, so he will account them lawfully done.

Besides the absurdities that followe this opinion, it is also of it self very vnreasonable. For if a man may reueale his brothers or his owne sinne, may he not much more his vertue? If God be glorified in detecting of sinne: much more in making their vertues knowen. If truth must needs be vttered of sinne, much more of vertue, for *wisdom* is *justified of her children*. If their doings be good and iustificable, then to  
conceale

Matt. 11. v. 19.



conceale the truth, is (in very truth) nothing lesse then to betray and forsake the truth.

And that this is but a vaine glosse deuised to couer their misdemeanors, and to escape from deserued punishment, may appeare by the desire they carry (by all waies and meanes) to cloke their faide actions. If their works were not of darkenes and secresie, they would not flie the light. For it is a propertie of *those which doe euill, to flie from the light*. If their doings be workes of the light, *let that light shine forth before men, that they may see those their good workes, and glorifie their father which is in heauen*. If they stand assured they haue done but well, what punishment soeuer should light vpon them for it, they should confesse their obedience, and their practise of the whole *Gospel of Christ*, (whereof they make their *Discipline* a necessarie part) and reioyce with the *Apostles*, that they are found worthie to suffer punishment for the *Gospels* sake.

But is not this strange, that where the most of this *Disciplinarie* humour thinke, they ought to discouer nothing of themselves, or of their brethren, that is *Criminal*: that these others shooting at the same markes, will (as they say) reueale their crimes only, but nothing else, no not their owne and their brethrens vertues and good deedes, belike for feare, least they should be counted to doe it of some vaine glory? yet this opinion giueth vs this aduantage, that if a man may lawfully reueale and discouer, not onely his brothers, but his owne crimes and offences: then haue they no colour but they must doe it, when by the Magistrat (according to law) and vpon their oath, they are so commanded. That which they may lawfully doe, that may the Magistrate lawfully enioyne, & they without disobedience to Gods ordinance may not refuse. So that for the lawfulness of ministering an oath to the partie in a cause *Criminal*, and thereby penall to himselfe, (being a maine & principal controuersie betwixt the State & them) we haue allowance by some of their complices positions, but yet we cannot get their practise vnto it. But more hereof in the next chapter.

The fourth & last of their opinions, touching such oathes, seemeth to be something better (and euen perhaps *Classically* or *Synodically*) digested by them, yet it seemeth to carry no small contradiction in it selfe, which (to their most aduantage that they can possibly haue it vnderstood,) I will seeke by distinction to reconcile, and to make stand together. These therefore seeme generally to holde, that for any thing, whereof witnesses may be had, the partie may not be examined vpon his oath. Out of which general, they deduce this: that the

*Iudge*



*Judge* may not examine a Preacher upon his oath, touching his doctrine deliuered in publike place. And if he goe about it, the Preacher without breach of dutie to the *Magistrate*, may lawfully refuse to sweare. But if the *Crime* be so hidden and secrete, that witnesses may not be had; then a man may be charged by oath. But this they also limit and restraine thus: so it be not *to drawe matter of accusation against themselves*, and to this purpose doe vñ 7. reasons. Yet the same men also say, that *to remoue euil from the land*, they wil take such oath, but they tell vs not plainly, whether they take themselves bound to doe it or not. So that I cannot see how to make these their owne opinions dwel peaceably together, except their meaning herein be this: that for crimes that be hidden being in themselves euill (that is, *Prohibit a quia mala*;) they wil be pleased to take an oath to reueale them: but things that be secrete where no witness can be had, and be none otherwaies euill, but because they be prohibited, such they may and wil refuse to declare by oath: which if they meane in deede (as it is very probable they doe) then doe they runne quite contrarie to the opinion of all men besides. For if it might be left to most mens choise, they would rather discouer of themselves and others, some breaches of statutes not directly forbidden by Gods law, then such as be so forbidden, and therefore conteine more turpitude in them, as *adulterie*, *periuurie*, and such like. But it must be remembred, that these men haue an odde grace in framing opinions of *diuinitie*, *pro re nata*, as present occasions leade them. And they temper not their actions (oftentimes) vnto their former conceiued opinions, but they conceiue opinions, and coine conceits, as may best stand for defense of their owne and their fauourers present actions. Nowe, because they hope to be found cleare (in their owne persons) of grosse and actuall crimes so expressely forbidden by Gods lawe, but not so cleare in breach of the lawes of this Realme, and peace of the Church: therefore is this opinion nowe stamped by them, to stoppe vp this gappe.

For the prooffe of this: that *where witnesses may be had, there a man may not be examined upon his oath*: First they say, for Iudges finding out by Inquisition what is spoken or done, they finde two waies in Scripture: one by witness of others, where they may be had, which they goe about to prooue by these (a) places quoted in the margent: the other way, by the parties owne testimonie, where witness cannot be had for the thing spoken or done, whereof necessarie inquisition is made, which they prooue by these other (b) places there also quoted.

a Deut. 13. v. 12. & 15.

Deut. 17. v. 2. & 7.

Numb. 35. v. 30.

Deut. 19. v. 15.

Ioan. 18. v. 20. & 21.

1. Tim. 5. v. 19.

b Ios. 7. v. 19.

Exod. 22. v. 7. 8.

& 10. 11.

Num 5. v. 13. &

19.

But



But is this a good consequence; these two waies be mentioned in Scripture: *ergo*, there be no more but two? or if it were admitted there be no more waies mentioned for *Inquisition of crimes*, doth it followe, that therefore all positive lawes of Common-weales & kingdoms, for *Inquisition* and *triall of crimes*, in any other sorte, are unlawfull, and against Gods word? What is this else, then plainly to overthrowe and condemne as vngodly, not onely the *Inquisition* and *trial* by *Iuries* and *verdictes* of twelue men, vsed in this Realme, and not mentioned in Scripture: but also the proceedings *Iudiciall* of all the world besides, if they doe not wholly iumpe in manner and forme, with the *Inquisitions* and trials mentioned in Scripture? and so (in steade of all our positive lawes) to bring in place, the *Iudicials* of *Moses* (giuen onely to the people of the *Iewes*) not onely for the equitie of them, but for the very substance and forme of them also? whereby the *Priestes* shall be *Iudges* what is lawe, in euery difficult and controuersed point, in whose iudgements (vpon paine of death) euery man must rest contented.

By this their Position, I thus prooue against themselves, that they doe wickedly, in refusing to take their oathes. Wheresoeuer in an *Inquisition* of a *crime* no witnesses can be had, there (by the lawe of God) the parties themselves must take their oathes, and declare the whole truth.

But of their framing of a booke of new *Discipline Ecclesiasticall* and *Synodicall*, of their subscribing to it, of putting some part of it in practise, of meeting in *Classicall Assemblies* or *Conferences*, in *Synods*, and *generall Assemblies*, of matters there treated of, and concluded against the lawes and gouernment of this Church of *England*, with the *circumstances* of these and euery of them, no witnesses can be had (as experience it selfe sheweth,) for they were kept as close and secrete as could be, they were done in priuate places and Chambers, from whence all others were seclused, sauing the very parties themselves, (being all principall delinquents,) and not called thither, or being there as witnesses. Therefore (by the lawe of God) they ought herevpon to take their oathes, and to declare the whole truth in those matters. For so is their owne *Position*.

Deut. 13. v. 12.  
13. 14. 15. &c.

Nowe I will examine their seuerall proofes brought. The first is this: *If thou shalt heare say concerning any of the Cities which the Lord thy God hath giuen thee to dwell in: wicked men are gone out from among you, and haue drawne away the Inhabitants of their Citie, saying, let vs goe and serue other gods, which ye haue not knowne: then thou shalt seeke, and make*



make search, and enquire diligently: and if it be true, and the thing certaine, that such abomination is wrought among you, thou shalt even slay the Inhabitants of the Citie with the edge of the sword, destroy it utterly and all that is therein, and the cattell thereof with the edge of the sword. Where you see, the punishment is vniuersall; (though the first perswasion came happely from a fewe) and therefore the defection from God vnto Idolatrie, was there also generall: for the iustice of God is, that the soule which sinneth, that shall die. Now can this prooue, that no partie to the sinne was examined, but that they were conuicted onely by witnesses? Nay the contrarie rather is hereby manifest. For who is so fit and so likely to haue knowledge of things done in a citie, as those that dwell in it? and therefore the lawe alloweth Citizens for good witnesses of matters there done, euen when it is for their owne benefite, because (by common entendement) others cannot be had. I wil aske then, whether this general condemnation and execution against a whole citie, might proceede onely vpon hearesay? this were very vniust and cruell, and it is faide, it must be knowne certainly. If vpon certaine and sure conuiction, then cannot it be otherwise then by the examination of some in the Citie, who onely can knowe the certaintie hereof. But these are all parties, *quia quos par culpa, eosdem tenet & par pena, & e conuerso*. And therefore it followeth, that this *Inquisition* heere spoken of, was founde out by some of the parties owne examinations, rather then by any other witnesses dwelling abroad, and therefore not able to deliuer any certaintie. But in so penall a matter, a man will hardly confesse without torture or oath: and an oath is for confirmation. And therefore it may happen (by the equitie of Gods lawe) for a man (in a matter criminall, and euen capitall to himselfe,) to be examined by oath. How much more then, of a crime not so penall? *Id est, non solum in rebus, sed et in personis, vnde, boni*

Ezech. 18. v. 4.

Ezech. 18. v. 4.  
15. 01

Heb. 6. v. 16.

Ezech. 18. v. 4.  
15. 01

That other of the 17, of *Deuteronomie* is left at large, without expressing, whether the partie condemned thereof of Idolatrie, were to be examined vpon his owne oath or not. Besides, in matters capitall, and where there is an accuser (as it is there) no man in this Realme vrgeth an oath. But it is necessarily to be gathered, that at least the partie contented did answer the accusation or *Inquisition* there by dootally, before the witnesses were produced: which many of this sorte of men will not doe either the one way or the other.

The other two places of the 30. of *Numbers*, and 19. of *Deuteronomie*, doe onely determine, that no man shall be condemned vpon one witnesses deposition onely: and make nothing to prooue either



off or on, whether a partie may be examined by oath, where witnesses may be had or not had? except they minde to gather it thus: there be mentioned onely deposition of witnesses to the conviction of a matter: therefore no course besides or in any other forme may be vsed. But this cannot be: for though the partie deny it (yea with oath,) yet upon two witnesses shall the matter be established.

For if such collection were consequent vpon these two places, then albeit a man would willingly confesse the matter against himselfe, he might not be cast and convicted, till also witnesses should depose no lesse. But this is absurd: *quia nulle sunt partes Iudicis in confessum, nisi ut ferat sententiam*. Besides this, the condemnation by *Iuries*, were then quite to be condemned, as vngodlye. For they may giue verdict sometimes but vpon one witnesses testimony, and sometime without any vpon violent and strong presumptions only, which (in hidden crimes) are very good proofes. Neither are they of the *Iurie* to be accounted as witnesses, but are as a kind of *Judges of the fact*. Therefore in *Magna Charta*, it is called *Iudicium per pares*, and they much resemble *Pedanei Iudices*, or *Recuperatores*, in the *Ciuill* law, and *Pares Curie* in the *Feudall* lawe, practised chiefly in *Italy*, *Germany*, and *France*.

Ioan. 18. v. 19,  
20, 21.

The place in the Gospel of *S. Iohn*, where *Christ* being asked by the Priest of his disciples and doctrine, doeth answer thus: *why askest thou me, aske them that heard me: for I spake openly in the world: I euer taught in the Synagogues and in the Temple, whither the Iewes resort continually, and in secrete haue I said nothing*: they doe greatly insist vpon, & vige as a commandement to this purpose: that where any witnesses may be had, there a man may not be examined himselfe, but especially, touching doctrine publicly deliuered: but they are manifoldly deceiued. Every action of *Christ* is for our instruction, saith *S. Augustine*, but not for our *Imitation*. Therefore of any particular action done or not done, according to seuerall circumstances by our Saviour *Christ* (being the wisdom of the father) we may not gather a generall doctrine of *Imitation*, except we were sure of all the causes and circumstances then concurring, that so did mooue him at that time. When *Iesus* was falsely charged by untrue witnesses, he answered nothing, though he were vrged greatly thereunto by the Priest, but helde his peace: yet when the Priest presently thereupon aduised him by shewing God to tell them, if he were the *Christ* the sonne of God: he made them answer, though by his *Diuine* wisdom he knewe, they meant to make it capitall vnto him. Nowe, shall we hereupon gather

Matt. 26. v. 62,  
63, & 64.



gather, that whensoever our wordes bee calumniously detorted by false witnesses, to our great daunger before a *Iudge*, and wee vrged by him to make aunswere, that we are bound to holde our peace?

When *S. Iohn Baptist* was asked by the *Priestes* and *Leuites* a cap- Ioan. 1. v. 19. & 20.  
tious question, such as if hee had beene (as they seemed to doubt) the *Messiah*, might haue turned him to great danger, viz. *what he was? he confessed, and denied not, but saide plainly, I am not the Christ.* So that we see such a generall doctrine as they gather, may not be thereof collected.

We are therefore to knowe, that the answere was very apposite and fitte vnto the question, that was infinite and generall touching *his doctrine*, which no man (otherwise then in generalitie) can answere, and therefore the answere was correspondent: for it was as if he had sayde thus vnto them: you aske me of the whole doctrine by me taught, this is impossible for me to answere and recount vp vnto you: if you thinke any thing therein particularly to be erroneous or seditious, enfourme your selues by those that haue heard me, and then what you shall to obiekt, I will be readie to answere. This you may easily doe: for that which I haue taught, I haue done it publikely in the Temple, and in Synagogues, and not in corners: so that you shall not neede to make me take vpon me such an endlesse and impossible worke, as you might haue iust occasion to doe, and to make me yeelde account, if my *teachings had bene in secrete*.

Whereupon thus I gather against them: If *Christ* being willed to giue an account of his whole course of doctrine, did therefore refuse, because it was too generall a question to be answered, and because it was onely in publike places deliuered by him, (so that they might easily first enfourme themselves, what they tooke to be amisse, and woorthie to be obiekted against him) inso much as *he had sayde nothing in secrete*, which if hee had, might haue giuen (in trueth) iust cause vnto them to examine him selfe, what pointes they were that hee so carefully did auoide the light to teach them in: then these men that bee asked not of their doctrine in generall, but of their particular actions in this and this point, in this place, at that time, done not publikely, but (of set purpose) so couertly as might be, so that no witness (but suche as bee also parties) can bee had: haue no iust defence nor colour of it out of this place. And therefore of suche hydden crimes



(by their owne position) they must answer by their oathes.

Besides, *Christ* was not detected (afore) of any particular matter where with they might charge him: neither if he had bene, was it his principall purpose (otherwise then that he would leaue testimonie that he died an innocent) to stand to cleare and excuse himselfe particularly, that the *determinate counsell of God* might take place with him.

By the premisses may appeare, that the three reasons they bring, to prooue this manner of question & *Inquisition*, moued by the *Priestes* to be vnlawfull, are altogether needelesse, seeing no man defendeth it. But for prooffe either of that more generall position, viz. *where witnesses may be had, a partie may not be examined*: or of the more particular, viz. *that a Preacher may not be asked of any pointes of his doctrine by him publickly detinued*, neither doeth this example of *Christ*, nor the places which they bring, & are here quoted, (a) make any thing at all. I would those that haue leasure, would but turne to the, that they may knowe, with how little either iudgement or sinceritie, these men doe handle the worde of God.

1. Cor. 14. v. 30.

32. 1. Thess. 5.

v. 20, 21.

Amos 7. v. 14.

Gen. 19. v. 20.

& 10. 12.

2. Tim. 2. v. 2.

1. Tim 5. v. 19.

The place to *Timothy*, that *against an Elder or Priest, an accusation shall not be admitted, without two or three witnesses*: maketh neither hote nor colde to prooue, that wheresoeuer witnesses may be had, the partie may not be examined vpon oath. I haue heard it brought to exempt them from being enquired into at all, except two witnesses doe first verifie the accusation, before it be preferred. But it serueth both these turnes alike. First, that place is meant, that it shal not be holden otherwise as sufficient to conuict him: the word is *non recipiatur*. allowe it not. If it were meant of the first entertaining of an *accusation*, then those absurdities would followe: that the *Accuser*, who at his owne perill *debet venire paratus*, should (by the very receiving or reiecting of it,) knowe afore hande what his witnesses haue deposed or can depose: and that witnesses may be examined to a mans prejudice, *parte rea non citata*, or else that they must be twise examined, once before the accused doe come, and once afterwards.

Besides, those men (that claime it) are proceeded with, not *per viam* of accusation, but by way of *Enquire*. And yet there bee witnesses (in sorte) of their crimes, before the accusation bee received: for if vpon the *same* they bee called, then a *multitude* testifieth against them: if vpon *Indicia*, *Evidences* or *Presumptions*, the like is to bee sayde: because these in lawe



are equivalent unto a fame, as hath bene touched before. And to satisfie them the more herein, the law requireth not, vpon an *accusation*, that the party should be examined by his oath touching the very crime. But they (because they will be waiward and preposterous in all things) pretend it to be lawfull in a court Ecclesiasticall for a man (when there is an *accuser* as in the Starre chamber) to be put vnto his oath, for the truth of the very crime, but not *ex officio Iudicis*: which if the law Ecclesiasticall would warrant, the Iudges thereof might soone haue the oathes of these men by their owne position & grant. For who knoweth not, how easie it were to enioyne any officer of the Court, or one of their men, to preferre the matter, and to stand forth (as they call it) an *accuser*?

The two places remaining out of the 22 of *Exodus* and the 5 of *Numbers* I haue touched in the next chapter afore, shewing there, that they prooue that a man may be examined vpon his owne oath in a *criminall* cause, though there be no witnesse, but a bare suspicion of the aduerse party. But that a man may in no other case besides be examined, where perhaps witnesse may be had (which is their purpose in this place) there is no colour nor shadow in either of them, except they haue learned to reason out of euery single place of scripture, both affirmatiuely and negatiuely thus, *vz. This may be done, and therefore nothing els may be done.*

For the prooue of that second position, *vz. that if a Magistrate do require a preacher to answer vpon his oath, touching any doctrine by him publicly deliuered, he may without breach of his duty, lawfully refuse to sweare*: I doe see nothing further by them brought, that is woorthy the answering. For whereas *Caluin* and other *diuines* say that the vse of oathes is vpon necessity, & for matters hidden: it is not meant by *hidden*, that an oath can not lawfully be giuen where witnessses may be had, but where the thing is neither notoriously apparant, nor confessed by the party: for so long, is it hidden to the Iudge, who must proceed *secundum allegata & probata*: otherwise an oath might not be giuen to a witnesse, because the matter is knowen and manifest to him. As for the necessary cause of giuing it, what more necessary then the discouery and suppressing of sinnes and offences, both in Church and Common wealth? But these mens grieve is, that they are not made the *Iudges* whether the things they are to be examined of be necessary and of importance to be declared.

All that is spoken of the seuerall conuentings of *S. Paul* before magistrates in the *Acts* of the *Apostles*, is spoken vnto afore, and no way

Act. capitū.  
24, 25, 26.  
fits



sits this purpose : for where there be *accusers*, there the parties oath is not required. And yet *S. Paul* there answereth particularly, confessing some thing and denying other some, of *doctrine* and actions objected. Neither is it to be thought, that he would say otherwise, being not sworne, then he would haue done if he had bene sworne.

Now whereas they say, that to remooue euill from the land, they will sweare (though the sinne be secret) but restraine it thus: *so it be not to draw matter of accusation and conuiction against themselves out of their owne confession*: it is (in effect) as if they had said, that in a cause criminal (except they meane according to my former distinction, that *malicia prohibita*, are no such euils as are to be discovered or removed from the land) whatsoeuer to themselves, they will take none oath at all. And according to this interpretation, their seuen reasons (being all that I haue hitherto hapned of) doe indistinctly tend: First, they say it is an approued *maxima* of the law: *Nemo tenetur seipsum accusare vel prodere, siue propriam turpitudinem reuelare*. But I haue shewed afore by true distinction (out of the same law whence this is drawen) that it is to be vnderstood in crimes, simply secret, and no way disclosed or come to light: for when those that were secret afore, by some of those wayes (that do open a way to further enquiry of a person supposed criminous) are come abroad, and so (in some sort) manifested: then those former rules, and that of *Chrysostome*, *Non tibi dico ut te prodas in publicum, neq; apud alium accuses*, hath no further place: for then the law saith, *Sic proditus tenetur seipsum ostendere, & suam innocentiam purgare*: and this is for auoiding of scandall, and that the party may be reformed. Therefore doth *Aquinas* himselfe very grauely resoluē, *Cum quis* (saith he) *secundum ordinem iuris à iudice interrogatur, non ipse se prodit, sed ab alio proditur: dum ei necessitas respondendi imponitur per eū, cui obedire tenetur*. And againe, very pertinently to this purpose, of giuing and taking an oath: *Quicumque facit contra debitum iustitie, peccat: sed pertinet ad debitum iustitie, ut quis suo superiori obediat in ijs, quæ exigit secundum formam iuris*. This distinction of the said rule, is strongly confirmed by that which is alleged of the oath of ielousie, and of him which is *deposuarius* in the law of God, handled in the next chapter afore. For if they that be bewrayed but by the onely (perhaps) vaine suspicion of another party (pretending griefe) must vndergoe so strait a course of *purgation*, or els *accuse* and *bewray themselves*, to their apparant shame and dishonesty (besides the grievousnesse of the punishment) how much more is it equall, that those that by infamy, or vehement presumption, or such like arisen, are discovered

Chap. 15.  
2. partis.

Chrysostom.  
31. ad He-  
braeos.

Thomas 2.2.



discovered to the *Magistrate*, and by him (not for private satisfaction but for the publike good and benefit of the realme) are vrged to such oath, and for their owne reformation, should either take it, or els (according to those examples and to all good lawes) be reputed convicted by their owne implied confessions?

To this point is that very pertinent, which is alleged by *Gratian*, De penitentia dist. 1. c. quia aliquando in fine.  
out of an ancient father: *Taciturnitas peccati, ex superbia nascitur cordis: ideo animi peccatum suum quisque celare desiderat, ne iniquitas sua, alijs manifesta fiat: ne talis reputetur apud homines foris, qualem se iam dudum exhibuit divina conspectui.*

Their other fixe reasons to this purpose, I doe blush (in their behalfe) once to mention them, they are so childish, so vage, and flashy: the rehearsing of them doth carry a confutation and answer of his backe: as that he which is put to this oath is bound to proove a negative against law: that it doth pervert the end of the Civill law, which is to be safe: that it transserreth the glory of God vnto man, by searching mens consciences: that it is contrary to the equity of Gods law, in that witnesses should stand forth, and not be accuse himselfe: this is coincident with the first of the seven: that it is of the nature of auricular confession: that it is a nourisher of slanderous persons, because not the slanderer but the partie accused must take his oath. If the reasons were to be put into forme of *Syllogismes*, these propositions must be vsed as *assumptions*: but they are not onely very untrue, and to be denied, but also are not at all proued by their *Prosyllogismes* ioyned vnto them, to vpholde and vnderpropp them.

So that to conclude this point, their opinions against this kinde of oath, are neither reasonable, nor their reasons vsed against it, of any force or weight.

CHAP. 18.

*That a man being charged by authority to discover his know'edge touching that which his Christian brother hath done, whether it be an offence, or a lawfull action, is bound to reueile it, though it may breed trouble and punishment to his brother: and the reasons to the contrary answered and refused.*



IN my generall distribution of this second part touching the maner of proceeding, holden in courts Ecclesiasticall (and challenged of vnlawfulnesse or of impiety by the Innouatours) I there noted, that fault is found by them, not onely because oathes be given (in criminall causes) vnto the parties themselves: but because



namque de  
...  
...  
...

because they are examined as witnesses also, touching other their complices and brethren. This their challenge is in this respect: for that it is sought (they say) by vertue of their oath, to draw out of them, such their brethrens actions, as albeit the lawes of the realme, and those who are their Iudges, do holde them to be crimes and offences, and minde to punish them in that quality; yet themselves that are purposed to be examined, are perswaded that they are well and commendably done, whether by themselves, or by any other their brethren: And therefore they do thinke that they are bound in conscience not to take an oath, whereby they may be tied to so vngodly a discovery of their brethrens good actions, and so to bring them to trouble or punishment. For if they were offences & crimes, then (they say) that to remooue euill from the land, they would be ready to reueile them vpon their oath: but being as they take them to be, (whatsoever other men do) by no meanes they may discover them. And this point is now by most of them (that seeme to be of skill) chiefly rested vpon (letting other easily go) albeit they deliuer this abroad charily, and somewhat fearefully: but the absurdities and inconsequence of this opinion, I haue somewhat touched in the seuenteenth chapter of this part.

I will now assay to answere the reasons which I haue heard brought for the establishing of this conceit. But first I must put you in minde how vnreasonable and inconuenient it is to be accounted in all practise of lawes. When the defendant hath denied a crime objected, if it might be free (for all that can testify) to make such pretence, to the intent to excuse themselves from that necessary duty vnto the Common wealth; what criminous person could or were likely to be conuicted? insomuch as by the Canon & Ciuill lawes, sometimes he that is supposed to haue appointed the delinquent to do the fact, he that is his surety, he that is called into questio for the same crime, he that is fellow or familiar with the suspected person, may be compelled to sweare. By the Common law, if such (as are supposed can giue euidence for the queene) should not often times be compelled thereunto by authority, would there not (in many causes) want due prooffe for iusticing & execution of offenders? But to this is said, that men are but bound in an obligatio or recognisance to prosecute the felony. It is true: what other bond should any man enter for his apparance? but if he refuse that, may he not be sent to the gaole himselfe? yet when he cometh before the Iudges, he is bound also by a necessary oath to giue true euidence (to the vtmost of his knowledge) against the prisoner, or the person

l. 6. § 4. C. de  
his qui ad  
eccles. con-  
fugiunt.



person to be tried. Which if he shall refuse, he is like to stand in bolts with him, whose fault he minded to conceale, as hee well deserueth: and happely may be condemned to pay a rounde fine besides for his notorious contempt, and for abetting of offenders in their lewdnes. And if it be said (as some haue objected) that this is not a misse, so the party be willing to testify: but it is hard to bind him (vpon his oath) to testify, whatsoeuer he knoweth against the defendant touching that matter: truly I cannot gesse whereunto this speech may tend, except witnesses might say what & how little they list of the truth, or y these would haue mens words be beleued against others (to their conuiction) without an oath. But what matter can be confirmed without oath in any outward actions of men, not knowne by some sense vnto the Judge? it is the lawe of nature and nations, to beleue no man against another, without an oath. For why should not any mans bare deniall for his owne absolving & clearing, be as strong as many other mens bare wordes likewise, for his condemnation? *quia promiores esse debemus ad absolendum quam ad condemnandum*. Therefore the holy Ghost noting it to be a law of nations, that no mans word (vnsworne) should be receiued, thus testifieth, that an oath for confirmation is amongst men Heb. 6. ver. 16. (indefinitely, and therefore most vniuersally) an ende of all strife. It is tolde of one only amongst the heathen, named *Zenocrates* (as a mar- Alex. ab Alex. Gen. Dierum. Lib. 3. cap. 10. uaile) for whose bare word the *Athenians* (by a law) decreed, that it should be holden of as great force as his oath in al matters: such was his rare and singuler vprightnesse and integritie.

Touching their reasons, I make this to be the first as most general: *vz. Because they haue not instly incurred the Magistrates displeasure by any offence, therefore they cannot hold themselves bound in conscience, to be the Magistrates instruments against such, as be none offenders.* To which may be added, that they are bound to seeke rather the deliuerance of the Innocent, because it is said: *Deliver them that are drawn to death: and wilt thou not preserve them that are led to be slaine?* And it is noted as a Prouerb. 24. ver. 11. fine by *S. Paul* himselfe, that hee stood by, consented to *Stevens* death, Act. 22. ver. 20. and kept the clothes of them that slue him.

As if they should say, We haue gone (in this matter) as farre as our brethren, we know our course to be good, whatsoeuer the lawes or the Magistrates determine or thinke to the contrary, that doe but seeke to punish vs for it. And seeing we are so well perswaded of our innocencies, we may not be any instruments of our owne further detection: for this were to consent, to haue guiltlesse men punished. But is not this to take vpon then (being but witnesses of the fact)



to iudge also, of the lawe what it ought to be, and to condemne it as it is, and is it not in effect as much as to condemne the lawes of iniustice, and the magistrates of tyrannie, persecution, and of seeking the blood of innocents?

But if the lawes were so, yet to tell (as the commandement of the magistrate) the particulars of these their actions soounifiable (as they thinke) whereof the *Magistrate* already know the generalitie, is not to consent to the punishment of innocents. Doth euery one that confesseth his owne crime, & pleadeth guiltie in a cause capitall, consent to his owne death, or is thereby guiltie thereof? then why is he consenting or guilty of their punishing (due by lawe for these actions) that only declareth them truely as they are, more then he that confesseth (being indeede guiltie) may be said to be guiltie of his owne death? It is a subjects dutie but most of all in causes not capital to himselfe) if he be required by authoritie, not to dally, nor to lie vnto the *Magistrate*, but to tell the fact truely as it was, whomsoever besides it may concerne. Nowe, if thereupon, either the *Magistrate* punish him where he ought not, or more grieuously then lawe permitteth, or if the lawe punish that as a crime, which is a vertue: the fault and guilt is not in them that declare the truely, but either in the *Judges* or in the *lawe*. Nay, to enforce this point further, I would aske this question of euery of them that be of that side: If a man being of necessitie to pleade either guiltie or not guiltie to a crime capitall vnto him, or els to be pressed to death: If he be guiltie of the fact, yet happely not pregnant (no nor any likely) euidence can be brought against him: whether *in foro conscientie*, without any sinne, may such a man (knowing this) plead not guilty vnto the matter of the inditement? for the *time, place, and words of foume and course*, are not trauerseable: on the other side, if in this case he pleade guiltie (being so in deede) whether he is thereby guiltie of his owne death or not?

Now for auoyding of sinne before God, if such one ought to plead guiltie, and yet shall not thereby be made guiltie of his owne death: why shall the declaring of the truely touching other mens actions, make him that reueileth it (being charged) guiltie or consenting vnto their punishments, how vniust soeuer otherwise they might be surmised to be? for if any mans faults may be spared, a man might most lawfully spare himselfe: *quia Ordinaria charitas incipit à seipsa.*

And to presse this reason (*à Paribus* at least, if not *à fortiori*) a litle further: If such a man shoulde chuse rather to be pressed to death for standing mute, and not answering directly vnto either, should he not



*de iure positi* (in true termes of *Divinitie*) be accounted guiltie of his owne death, & to be (in the sight of God) a murderer of himselfe: the very like therefore is to be iudged of these persons: v. z. that their punishment (as convicted of the crime) is most iust, that their blood is vpon their owne heads, and that none are causes of the punishment inflicted vpon them but themselves: for standing obstinately mute, without direct answering (in forme of lawe) as they ought: though it were admitted, that such their actions were good, and they innocents otherwise.

And as the reueiling of other mens actions (when we are duely charged) maketh not vs guiltie or consenting to their punishment: so our refusing to answer, neither is any meanes in deede, nor is so appoynted of God for their deliuerance. For God will not allowe to haue innocents deliuered, by our disobedience to his Lieutenants on earth, nor by concealement of any truth, expedient to bee knowen, and commanded to be declared. And therefore that place of the *Proverbs* by them brought, fitteth not this purpose. For if being charged, they for their obedience sake, with a single heart and without intent to hurt the innocent, shal deliuer but the very plaine truth (how vniustly soeuer the magistrate may seeme to deale afterward) yet shal not the discouerer of the truth, bee a partaker of the magistrates sinne. For it is but *he that imagineth to doe euill, whome men shall call an author of wickednesse*, as is recorded in the same Chapter.

Proverbs. 24. ver. 8.

The other place out of the *Acts* is nothing like to the matter & case that we haue in hand. For *Paul* was not there charged by autoritie, to bewray any thing he knew against *Steuens*, much lesse to deale at all in that action: but he (willingly) as one forward of himselfe and of a malice against the very profession) which he then detested) did thrust himselfe into y<sup>e</sup> cause, & rather then he would not be some stickler in it, he thought good to do some office of kindnes (though it were but by keeping their clothes) vnto the tormenters & executioners of that holy *Martyr*, & thereby expresse & directly gaue his approbation & consent vnto his death. Yea, this their opinion is without any other like example in any text of Scripture, except they will take it from an *observation* pretended to be gathered out of y<sup>e</sup> next Chapter following. For I finde gathered before it was scattered, an opinion running with theirs in this behalfe. *If thou be put to an oath (saith that note) do not curse Diabolikes for swearing Gods: they ought to do so, or to terror any innocent man vnto Gods enemies & his: thou oughtest first to refuse such unlawful oaths. But if thou haue not constancy & courage so to do, yet know then that such*

Rhemish Testament. in annotat. cap. 23. Act. Apost. ver. 12.



T. C.

rather binde not at all in conscience and lawe of God: but may and must be broken, vnder paine of damnation. They will not confesse, that they haue sucked this opinion from hence: and they may not be endured to flappe vs out with their olde dogge trick, and to say they borrowed it not of the Papists, but obserued so much themselves, by reading of the Bible. For this were both to iustifie their owne, and withall this corrupt doctrine of the Iesuites also: as if they both (so well agreeing together) were aright gathered from the word of God.

But they bring feuerall places and examples, whereby they thinke this is proued. The officers of the children of *Israel* that were appointed by *Pharaohs* task-masters, to looke that the people should make as much Bricke by day (and gather the strawe themselves) as they did when strawe was founde to their hands, seeing that the people were not able to performe it, and yet were beaten for not doing it, did signifie the impossibilitie and vnreasonablenesse of this, vnto the king. But he gaue them a resolute answer, that they shoulde doe it, ypbraiding them that it was but idlenesse, that made them pretende that they would goe to offer sacrifice vnto their God. Which thing was the ground of *Moyse* and *Aaron*s suite vnto him, that the people might haue leaue to goe into the wildernesse. So when these officers comming with this answer from the king, did meete with *Moyse* and *Aaron*, they expostulate thus with them: *Ye haue made our fauour to stinke before Pharaoh and his seruants, in that ye haue put a sword in their hands to slay vs:* meaning that their suite for going forth to sacrifice, did so discontent the king, that he would (in that respect) oppresse them, even vnto death.

Exod. 5. ver. 21

8. 127

But what is this to purpose? doth this phrase so please them of putting a sword into another mans hand, that they imagine, by what occasion soeuer a wicked man pickes quarrell to oppresse Gods children, that such a thing is of necessitie unlawfull to be done, whereof the occasion is taken? from the best actions of godly men, tyrants will oftentimes take occasion to persecute the whole Church: shall therefore all exercises of religion bee intermitted? even in this place, the message that *Moyse* and *Aaron* brought to *Pharaoh* (which occasioned such oppression to the children of *Israel*) was put in their mouthes by the Lord. And therefore they sinned not, albeit this was like to haue turned to be as a sword to destroy vp all the children of *Israel*: but rather these officers offended, that thus did mutine and grudge against those, that fulfilled Gods commaundement, and did but as they ought to do. Even so shall they offend likewise, that shall be



be displeased with such as doe what they are lawfully commanded, albeit trouble and punishment doe by that occasion happen vnto them that so take offence. So that this example doth make flat against their owne purpose & intention, and can no way helpe them.

Another example they bring of *Obadiab*: who hid 100 Prophets in two caues secretly, and susteined them with necessaries, when *Iesabel* flewe the other Prophets, that she could hitte of. 1. Reg. 18. ver. 4, 13.

But this cometh farre short of the purpose, for which it is brought. For who euer denied it to be lawfull to shew charitie vnto the Lords Prophets? then, there appeareth no commandement to the contrary, but that he might receiue them: againe, it doth not appeare that he was euer by authoritie charged to reueile them, or to tell his knowledge what was become of these Prophets, and therefore vnlke to the case in handling. furthermore it was (wholly) an vniust, wilfull, and tyrannous persecution, without warrant of law, or colour of any iudiciall proceeding. besides, if he had bene charged by *Iesabel* to discouer where they were, or comanded by her to relieue none such, yet had it bene no disobedience towards the Magistrate: for it is not noted to be the doings of the king, but that *Iesabel* slew them. Now the kings wife is no soueraigne, but a subiect her selfe. Moreouer the killing of the Prophets for no pretence or colour of cause at all, is in it selfe so apparant an euill, as no man can haue any shadow to giue a lawful consent vnto it. Lastly, a man cannot gather a general doctrine (in a matter doubtful & not plainly deliuered els where in Scripture) out of any particular mans fact: because all the circumstances which then fel out, are not knowen. But most especially an example can neuer serue to y ouerthrow of a general comandemēt, as in this case: v7. the precept of obeying the Magistrate. *Viuendū est legibus, non exemplis.*

Out of the first booke of *Samuel* they bring three other examples. 1. Sam. 19. ver. 1, 2.  
The first, that *Saul* spake to *Jonathan* his sonne and to all his seruants, that they should kill *David*: but *Jonathan* *Sauls* sonne, had a great fauour vnto *David*, and bade him take heede &c. The second, when *Saul* said to *Jonathan*: send and fetch *David* vnto me, for he shall surely die: *Jonathan* answered, Wherefore shall he die? What hath he done? 1. Sam. 20. ver. 31. & 32.  
the third, that when *Saul* comanded his seruants to fall vpon the Priests of the Lord, & to slay them: they would not moue their hands to fall vpon the Priests of the Lord. 1. Sam. 22. ver. 17.

To these three, one answere may serue. First, these comandements (though of the king) yet they were when hee was enraged and in a fury, after the Lord was departed from him, and an euill spirite was come vpon him. Againe, they were apparantly vngodly in themselves,



selues, that any shoulde kill an *Innocent* vpon the tyrannous and vnadvised commandement of the king without all colour of any lawfull course. Lastly, *David* was knowen vnto them to be afore appointed, yea, and their *annointed* king from the Lord, howsoever *Saul* was tollerated *de facto* to continue in place, till the measure of his iniquitie was fulfilled. And therefore (in this respect) was it vnlawfull to kill either him, or those that fauoured him, especially the Lordes

Ibid. ver. 18.

Priests: whose *linnen Ephod* should be a protection vnto them, against all such precipitate executions, where neither conisance of their cause, nor any due conuiction and iudgement, was precedent.

Exod. 1. ver. 17

Another example they bring of the midwives of the *Israelites*, to proue their intention. It is thus written, *they feared God, and did not as the king of Egypt commanded them, but preserved aloue the men children.*

This obiection carrieth his answere with him. For it is saide, *they feared God and therefore did not heresin, as the king commanded*: noting vnto vs, that the commandement was such as coulde no way stand with the *feare of God*. There is no Prince in the world to be obeyed, when he commandeth any thing directly forbidden by God: for *it is better to obey God then man*. The Prince is no God, nor yet Gods Lieutenant, but a meere man, in that which hee commandeth directly contrary to God. That this was of that kinde, it appeareth: for to kill is manifestly by the *morall lawe* of God and nature, forbidden. Yet this hath his exception: vz. that it is no murder, when wee execute the penaltie of law, vpon murderers and other wicked persons duely

Gene. 9. ver. 6.

conuicted and condemned. For *he that sheddeth mans blood, his blood shall be shed by man*, saith the Lord. But there coulde bee no colour or apparance of any *actuell* wickednesse in children newly borne, why they should be executed: being but by a generall iudgement condemned most wickedly and tyrannously, euen before they were: *non censetur existere* (saith the lawe) *qui adhuc est in utero matris.*

Nowe let vs compare these last foure examples, with the scope and purpose for which they are vsed. The very act of murdering a person notoriously innocent, because hee is neither conuicted, nor condemned, is *malum per se*, simply and absolutely in his owne nature euill, without any further circumstance. But to declare what a man knoweth to be done by another, the authours themselves of this opinion, must needs confesse to bee sometimes lawfull and requisite: and therefore they must at least graunt it to bee *medius Actus*, such as by circumstance may be lawfull, howsoever by the circumstances



circumstances of this case (as it is propounded) they will holde it unlawfull. And therefore there is such dissimilitude and diuersitie betwixt these examples, and that which they holde, as they can neuer serue this purpose.

Therefore to fit their turne, in the very poynt of the issue, they must prooue vnto vs, that it is vngodly for any man (though charged by lawfull authoritie) to declare his knowledge of another mans actions, if he that is vrged so to make declaration, doe iudge afore hand, that the *Magistrate* mindes to punish such action, either where he ought not all, or in other sort then Gods law permitteth.

For this purpose they alledge as strongest the example of *Rahab*: Iosh. 2. ver. who would not tell the king of *Iericho* where the two spies of *Israel* 3. & 4. were, though she were by him commaunded to bring them forth, and she is commended for it by the holy Ghost. Heb. 11. ver. 31

In answer hereof I say: wee reade not, that the king asked her, whether they were there still, or not, albeit shee answered that they went out: but shee was commaunded to bring them forth, which is something more, then to tell where they are, if shee had bene so asked.

Secondly, by faith (vpon hearing the miracles that God had done and wrought for the children of *Israel*) and by speciall reuelation, *Rahab* knewe, that God, euen the God of heauen aboue, and earth beneath, whose the earth is, and the fulnesse thereof, and who (according to his diuine prouidence and wisdom) doth translate and establish kingdomes, as it seemeth best to his diuine pleasure: had afore that, giuen that whole land vnto the children of *Israel*. So that in very right and trueth, shee did owe no more obedience to the late king of *Iericho*, but was by God discharged thereof, and lawfully might (as she did) submit her selfe, and capitulate (for her safegard) with those, to whom (of very right) her subiection then belonged: and therefore could not (without sinne) haue betrayed them being sent from *Ioshua* her lawfull soueraigne, into the handes of an vsurper, whom she knewe perfutely the Lord had deposed, and meant soone after to destroy accordingly. Iosh. 1. ver. 9. Ibid. ver. 13.

This interpretatiō is euidently & very strongly confirmed by that place of Scripture, where she is for this commended. By faith (saith that place) the harlot *Rahab* perished not with the disobedient, when she had receiued the spies peaceably. If then the rest of *Iericho* were disobedient (in respect of which, *Rahab*s obedience is commended) & therefore they perished by y hand of *Ioshua* & the people: is



is it not manifest that *Ieshua* was their lawfull magistrate in right, and that they ought to haue taken knowledge thereof, & to haue obeyed him, at their owne perils?

Lastly, there is in this fact something extraordinary and done by speciall *æconomy*, which by vs may not safely be followed: As the lie lo[2.ve.4.&] that shee made, in saying *shee wist not whence they were, and that they went out in the evening*. And likewise, it is not to be presumed by any subiects in these dayes (when as miraculous and speciall reuelations are ceased) to adiudge themselves either wholly, or in some particular actions and circumstances to stand discharged of their obedience and allegiance towards their soueraigne or vnder magistrates, when, and how farre themselves will fantasie. For if by this and such like extraordinary examples (or by that of *Obadiahs* hiding of the hundred Prophets) such presumption were lawful or tollerable: what a goodly colour might al disobedient & rebellious subiects haue, namely vnnatural fugitiues ouer sea, *Iesuites*, *Seminarimen*, recusants, concealers and harberours of these, and such like boutifoux and bellowes of sedition, for all their godlesse attempts? are they not, or at least wil they not pretend, to bee as assured and resolute of the goodnesse of their cause, as the *Disciplinarians* are touching theirs, and their designements? so that for these that would be counted most sincere professers of the Gospel, to hold the like dangerous positions, and to seeke to confirme them with the same and no better reasons and examples then the *Papists* doe theirs: for my part, I doe reckon it to be the practise and part neither of a grounded and iudicious *Demine*, nor of a well aduised or dutifull subiect. *quorum vestigijs insistūt, eorundem exitus perhorrescunt.*

But they say further: that by such oath, they shoulde bee drawn to discover vnadvised speeches that sometimes passe men in private fellowship as at table &c. or such as come vnto them for counsell, and for private resolution of their consciences.

First, there is no man bounde to answer more matters then be contained in the *Article* or *Interrogatorie* whereof hee is examined. But if any matter bee therein laide downe in such sort, as it leaderh (pertinently and directly) to such discouerie: then is it likely, that by some meanes it is detected vnto the *Magistrate* afore, and by him thought expedient (or some necessary publike cause) worthy of such *Enquiry*. Againe, if such private talke or asking of counsell haue bene concerning some platte or practise laide or to be laide, that shall be (in discretion) adiudged by the *Magistrate* expedient (for the com-



mon wealths sake) to be knowen and discouered, and therefore if they shall enquire directly of it: I can not see how it may stand with duty to God, vnto the prince, vnto lawes, and to the Common wealth to conceale it, being charged to the contrary. But of other secret speeches, treaties, and resolutions of mens consciences, no magistrate is of so slender discretion, as to enquire, nor can by law (though he would) for want of those *indicia* and speciall presumptions that are required, to ground an enquiry vpon: and therefore this is but matter deuised *ad concitandam & conflandam inuidiam*, against lawfull authority.

They object also, that by their discouery, some that be verie poore may be undone: and that the most of the matters & persons being already knowen vnto authority, there can be none vse for them to appeach any, but to alienate their mutuall affections, and to haue one another in ielousie.

This is very loose and simple, to reason vpon a casuall euent that may happen, thereby to prooue a thing vnlawfull: for of a good matter an ill euent may and doth often fall out, & e conuerso. *Careat successibus opto, quisquis ab euentis facta notanda putat*, could the very heathen poet say. And why should a man withdraw his duty to magistrates, onely for particular and priuate respects touching himselfe and some few other priuate persons? Whatsoeuer may happen, let him do as he ought: *Fiat iustitia, & ruat munda*.

Particularly to the first, why should any man pity his pouerty that pitieth not himselfe, but wilfully runneth into danger of lawes? and shall a man holde a poore man more deare vnto him then the common quiet and peace of the Church and Common wealth both?

The second part implieth a contradiction in it selfe: for if the matters and persons were sufficiently knowen, then in truth were it of no vse for the magistrate to enquire further: and if they be so knowen already, then what wilfulnesse is it in these men thus obstinately to persist to their owne hurt, and yet to do others no good thereby?

Yet they object further, that to discouer their brothers secrets, is condemned as a fault by the Holy ghost: for he that goeth about as a slanderer, discouereth a secret, but he that is of a faithfull heart concealeth a matter. And seeing they haue met in some mens houses that did it for good affection and opinion vnto them, if they should discouer such, it were a very vnthankefull requitall (they say) towards them. And for that their fellowship is in the truth, and the course they walke holy, therefore (euen by the law of loue and fellowship) they may not detect one another: for that were a note of a false brother.



As for the truth of the matters that they meet about, and the holiness of the course they walke, it is not of this place to discusse how truly and true soever it is, it dare not looke out at noone dayes, and yet they liue in a state professing the Gospell. Num sic Apostoli? num sic Martyres, &c? but the more true and holy it is, the lesse ought they to be ashamed to reueile it (being called into question for it) as is signified in the chapter afore. Here (we see) that the law of their loue and fellowship, and in hospitale, towards such their priuate friends as haue receiued them, is by them more esteemed and accounted of, then either the publike lawes and statutes of the realme, or then their duty to the Christian magistrate and to their countrey, *qui omnes omnium in se charitates complectitur.*

Cicero offic.

As for the discovering of a secret, of concealing a matter, and false brotherhood there spoken of, who doth not see that it is meant of needlesse, slanderous, malicious, and trecherous bewrayings of our friends, or of others secrets, and not of any iudiciall deposing of our knowledges, when we are brought before a magistrate? For if this were not lawfull and godly, then might no witness testify a truth in any matter whatsoeuer, that is not known abroad afore, or vnto the magistrate: for that it can not but turne to the declaring of some matter doubted of. The common translation, fortifieth this interpretation, *vz. qui ambulat fraudulentè reuelat arcana, qui autem fidelis est, celat amici commissum*: but how much their sence gathered hereof, differeth from the true meaning of that place, an ancient father sheweth:

Augustinus.

*Qui veritatem occultat* (saith he) *& qui prodit mendacium, uterque reus est: ille quia prodesse non vult, hic quia nocere desiderat.* So that he which telleth an vntrueth, and that concealeth a trueth (expedient for publike benefit to be known) are matched together as guiltie both, and not much vnlike. Therefore Aquinas expounding the true meaning of that place of the Proverbs saith, that such matters as tend to the corrupting either of the soules or bodies of a number, or to the great detriment of any one priuate person, a man that knoweth them, is in conscience bound straight way to reueale them.

Tho. Aquinas  
2.2.

Leuit. 5. v. 1.

So that all their objections being refuted, I will presse them in this point with this one pregnant place of *Leuiticus*, handled more fully by me in the sixteenth chapter of this second part, *vz. If any haue sinned, that is, if he haue heard the voice of an oath, and he can be a witness whether he hath seene or known of it, if he do not vtter it, he shall beare his iniquity.* But these (of whom we speake) haue heard the voice and forme of the oath, haue bene adiuured in God & in his Maiesties name,



and by authority charged and recharged, and they can beare witnesse, for they haue seene & knowne the matters (whereof the charge is) as themselves do confesse, and yet will not utter them, but obstinately, without any good ground (as may appeare) do persist in refusall: and therefore they do grossly sinne, and shall beare their owne iniquity, indistinctly, whether the matters to be uttered, be commendable in their brethren or not, and whether they shall (thereby) be brought into trouble, or vnto punishment, or otherwise.

CHAP. 19.

Their arguments are answered, that condemne the ministring and taking of an oath to be unlawfull, because they haue not distinct knowledge giuen vnto them of euery particular, before the taking of it: and the like course (by examples) is approoued lawfull and godly.

**N**other challenge of theirs, vnto the maner of proceeding against crimes in Ecclesiasticall courts (and concurring with the very tender of the oath) is: for that they are vrged to take the oath to answer truly, before sight and perusall of the articles and interrogatories by them had, whereby they might haue speciall and distinct knowledge of euery particular therein conteined. The cause why this exception is by them taken, is not for that they purpose to take the oath when they shall haue seene them; but because if they shall finde them to be such, as they thinke either can not be prooued when they haue denied them, or of that sort as they can easily wade thorow with them, then some of them (heretofore) haue not stucke or made any bones to take their oathes, whatsoeuer they will do now: and therefore they will not promise so much as to take the oath to answer them, no not after they shall haue seene them. So that it may appeare, this is but a gloze, & a quarrell picked by them (to aduertise their complices, how far they also may be touched) rather then any serious matter of scruple that they stand vpon.

The causes why it is not thought conuenient (by those that be in authoritie) to let them know all the seuerall particularities afore hand, and so to take oath onely to answer those are weighty: One is, because it is impossible in it selfe, for that one interrogatory often riseth of another, especially where a man answereth affirmatiuely: so that the oath may not be restrained onely vnto those that are set downe afore, if necessary occasion of circumstance doe lead further. Another is, because (as some of them haue done, when this fauour



hath bene shewed) they vse it but as a meanes to instruct their confederates for concealing of a truth; & after perusal, they themselves remaine as obstinate in refusall as they were before. And albeit no law (that I know) doth of necessity require so much as to shew them the articles, before they resolute whether they will take the oath or not: yet if any will sweare (afore) but thus; that he will peruse them, and after he hath perused them, that then he will take the oath, directly and truly to answer them (so farre as by law he is bound) then the sight of them afore hand neither hath bene, nor will (I thinke) at any time hereafter be denied vnto any such.

Some reasons I haue heard vsed against this course, to proue it vn-  
 Prou. 18. v. 13. lawfull. It is thus written in the *Proverbs*, *He that answereth a matter before he heare it, it is folly & shame to him.* Much more then (say they) is it folly to sweare to answer a matter, before he heare it.

In very deed, it is not possible directly to answer any matter before a man heare it: that is, before he know what it is. But the meaning of the Holy ghost there, is to taxe such as vpon a pretence or ostentation of pregnancy of wit, and quicknesse of conceit, or vpon some other rashnesse, wil take vpon them to vnderstand a matter, and to answer to it before halfe the tale & materiall points of it be opened vnto him: whereupon grossly mistaking the whole matter, such a man is oft times shamed, and folly is also imputed vnto him for it.

Besides this, their collection hereof is out of the rule that is in controuersie and practise: for there be neuer any sworne to answer a matter before they heare it. But (in deed) they take an oath (afore hand) to answer the matter truly, when they come to examination: and then they do heare all the matters objected before they need answer vnto them. The grand *enquests* do take a like & a lawfull oath, which is, *that they shall diligently enquire, and truly present all offenders against any such point as shalbe giuen vnto them in charge*, which charge is giuen after their oath is taken. Their next reason is, *that for a man to take an oath without a sure perswasion that it tenderth to glorify God, and to further his brethren, is sinne: because what soeuer is not of faith, is sinne.*  
 Rom. 14. v. 23. *And that this oath is such, for that a man knoweth not what the matter is, whereof he taketh his oath.*

Herein the assumption is to be denied, and the *prosyllogisme* or reason brought to proue it: for it is of, & also according to euery honest mans faith, to beleue himselfe bound in conscience to obey the positive lawes of his countrey, which require him to take such oath, if they be not contrary to Gods commandements. And albeit euery particular,



particular, neither is vsed to be, nor is meete, nor in deed oftentimes can be afore hand declared, which yet is requisite to be asked of him, as one question will grow of another: neuertheless the generall heads are signified and opened vnto him, and it is declared vnto him that he shall but answere matters of his owne facte or knowledge: that they touch neither his life nor limme, and that (if he thinke good to challenge any of them at the time of his examination, as not being bound (by law) to answere them) the Court shall & wil allow it vnto him, if in deed by law he be not bound to answere them. For the Iudges are appointed to yeeld vnto every man in differēt iustice, according to law.

Their third reason is: that *this kinde of ministring oath is infinite, and therefore a share to a mans conscience, and not like the oath, that Abraham gaue to his seruant.*

Gen. 24.2  
princ. vsque  
ad versum 9.

Though it be not like in this point, because that was but a promise to doe one particular matter, (whereas in our case the oath, albeit in some sort *promissorie*, yet the performance of it is *asserterie*, that is by telling the truth of sundry matters perhaps, and not one onely past or present) neuertheless this dissimilitude doth not hinder, but that this may be and is also no lesse lawfull, then that *promissorie* oath was which *Abraham* made *Eleazar* his seruant to take.

There is none infinitenes in it: for it is not generall, either concerning his owne or other mens thoughts, wordes, or workes, as slanderously and very vntuly is (by some) given forth: but hath as great certaintie (as may be) by reference vnto the articles afore exhibited, which are then declared to conteine particular diducing and laying forth of such and such speciall misdemeanours, with their pertinent circumstances of time, person, place, and manner.

Their fourth and last obiection is: that a man ought to sweare, *the Lord liueth, in righteousness, in iudgement, and in truth.* This iudgement and discretion (they say) that they cannot vse in such swearing, because they knowe not euery particular afore hand, whereunto they must so answere.

Ierem. 4. v. 2.

But this (if it be well weied) is a childish fallacie of the ignorance of the *Elenche*, for want of due distinction of times: for by reason the matters are many, and the articles oftentimes long, and therefore (besides fundrie other inconueniences and infinitie of trouble to the Iudges otherwise) are meete to bee examined apart at leasurable times out of the Court: In this respect therefore the oath is giuen openly in Court, and the examination is dispatched afterward by the examiner: and then acknowledged before a Iudge, as in diuerse

Courts



Courts Temporall is vsuall in like cases.

The *Indgement* spoken of there by the Prophet, that ought to be vsed, is not to be referred to the very *action* of the oath, when we take it *corporally*: but is meant of the aduised maturitie & consideration that we ought to vte, in the very depositions and setting downe of our answers: so that the not knowing of euery particular, when by oath we onely promise to answer truly at the time of our examination, doeth no way impeach or hinder the *iudgement* that is meete and required to be vsed in our answering, at what time we may consider fully and deliberately, of euery particular point.

That this is a true and no forced sence of the place, may be also gathered by the last point, required there vnto an oath by the Prophet; viz. that we *sweare in truth*: for in the very *Action* of taking the oath that *Truth* there meant, cannot be vsed; but must be shewed by the upright and faithfull answering, at the time of the examination, because as he that giueth the oath, doeth charge, so by the receiuing of the oath, a man doeth but promise to answer truly afterwards. And a promise doeth neither affirme nor deny the truth of a matter: but is to be made a true vowe and promise, by the due performance of it; according as the promise runneth.

The equitie of this proceeding yea farre aboue the lawfull practise of Courts on the other side the sea, (in their proceeding against crimes, euen capitally by the course of the Ciuill lawes) may appeare, by comparing of them together. They haue (in some sorte) two processes in euery severall criminal matter. The first is called *processus informatiuus*, which containeth al the *Indicia*, or the Euidences, presumptions & sayings of those, which can testifie against the party *enquired* of. These be taken for the priuate instruction of the Iudge, euen in the absence of the partie, and serue for to ground the *Enquire*. The other is the very *processe criminali*, whereunto the partie contented is to answer: and resembleth much our *Inditements* at the Common lawes, which inditing in *France*, they call making of a mans *Processe*.

Nowe it is by (a) generall custome obserued (where the *Ciuill* law hath place) that the supposed delinquent is interrogated, examined, and the witnesses also (after production in his presence) againe vpon their oathes repeated in the *Processe criminali*, before the partie may haue a copie of the *euidences* and *presumptions* taken against him, vpon the *Processe Informatiu*. And the Iudge shoulde doe euill, if hee should otherwise obserue it. For (b) that which hath receiued interpretation and approbation of equitie, by continuall practise and long custome,

a Conrad fol. 255. & Foller. in Pract. crim. fol. 165. nu. 9. & 10 doc. in Pract. fol. 24. nu. 18. Mar-ranta in Specul. fol. 8. nu. 8. b Innoc. in c. bonæ el. 1. nu. 5. de elect. Baldus in l. edita. in repetit. Patrau. nu. 30. C. de edendo. & in l. ea quidem. nu. 42. C. de Accusat & alij plurimi.



Some ought not to be abolished. The reason of this course holden, is great and weightie for other wise, by the Publication and copies of the *Processe Informative* given vnto them, the supposed delinquents (being instructed thereby what Evidence is to be vsed and given against them) might and would (for their owne safeguard) practise with the witnesses, and either withdrawe them cleane away, or else suborne and corrupt them.

This *Processe Informative*, I meane all the particular pointes of the Evidence and presumptions, (yea and some times also the witnesses names, that can testify and may be vsed) are both in the Court of the high Commission, and in *Ordinarie Courts* inserted into the Articles objected. Nowe, as soone as the conuicted partie hath answered the Articles, he is in this Realme (of course) to haue a copie both of them, and of his answers made vnto the Articles delivered vnto him before any witnesses be called or vsed. So little cause haue these men to complaine of any rigorous or stricke course vsed towards them, as by example of the generall custome of the world abroad, might be followed. And therefore they haue no such cause to complaine themselves, as of a thing vnusual, for not hauing other then a generall knowledge of the matters against them, before they swear.

But if their oath taken were so generall as they pretend, whereas it is in deede (by way of reference) very particular and certaine: yet they might finde examples for approving of the equitie of othes more generall then this, both in the lawes of the Realme, and in the worde of God.

At the Common Law is not the oath of *Overy* in the *Grand Enquest* at all Sessions, and *Assises* to enquire and present all within that Shire that be culpable of any the lawes and statutes that they shall haue in charge, that is afterwarde to be given, as large, yea and a more generall oath then to swear to answer halfe a dozen, or sometimes a dozen Articles or Interrogatories remaining in Court preferred.

By statute it is appointed, that *Enquirours against Conuictors* shall make all the Bailiffs swear, that they shall well and faithfully do that which they shall haue in charge by the King and his Counsaile, and shall conceale nothing of it.

Iustices of peace (by an olde statute of *Richard the 2.*) are to be sworn duly & without fauour to keepe put in execution all the statutes and

Stat. de Exon.  
de inquisi-  
per Corona-  
tores.

12 Ric. 2. ca. 7.



- 27 H. 8. ca. 5. and ordinances touching their Offices. The like oath, and somewhat more generall is appointed vnto them by a later statute to be taken, viz. that they shall keepe all statutes made and to be made. The oath established to be taken by great Officers of the State, and of iustice (vpon another occasion afore alleaged) is also of greater generalitie. For it is enacted, that great Officers about the king, and in his Courts of Iustice, shall from time to time, forward be sworne (when they shall be put in office) to keepe and mainteine the Priniledges and franchises of Holie Church, and the pointes of the great Charter, and the Charter of the Forrest, and all other statutes, without breaking any point. The oath appointed by the nowe repealed statute against Heresie, was very generall, and yet thought agreable ynough to equitie: for this oath was not the ground of the repealing it. By it was determined, that the Chancellor, Treasurer, Iustices of the one Bench, and of the other, Iustices of peace, Maiors, and Bailifes of Cities and Townes, and all other Officers hauing gouernance of people, should make an oath, to put their whole power and diligence, to destroy all manner of heresies and errors, &c. and to assist the Ordinaries and their Commissaries, and them fauour and mainteine, when they shall be required.
- Gen. 21. v. 23. In Scripture, by the oath that Abimelech ministred to Abraham, and he tooke it, appeareth that thereby Abraham was to deale well with him, (or as the Hebrew word is, not to deale falsely or lie) vnto him nor vnto his children, and his childrens children: and that he should deale well both with him & the whole countrey, according to the merite & kindness there shewed vnto him: which is of greater largenes and generalitie, then that all the particulars (falling vnder that oath) can possibly be forethought, or called to minde at the taking of it.
- Gen. 25. v. 33. By Iacob requiring an oath of Esau for confirmation of the sale of his birth right, (a thing of greater generalitie and consequence then Esau could or did then consider) may be gathered, that an oath may be vrged, though every particular included therein, be not specifically rehearsed: for the oath was approoued, and stood ratified.
- Gen. 26. v. 29, & 31. The like generall league and covenant, that was betwixt Abimelech and Abraham, was also after made and sworne, betwixt Isaac and Abimelech.
- Isa. 38. v. 14, & 15. And albeit it be not directly set downe, that the king exacted an oath of the Prophet Ieremy, yet we finde a promise of the Prophets then made to answere, after the kings charge was laide vpon him (of answering truly, what he should aske him) without expressing any particular matters afore hand, what he would aske: yet may we not there-



therefore charge the Prophet to haue done this without faith, or foolishly, vnadvisedly, or without iudgement. And it is sure that a godly man ought to haue no lesse regarde to performe what he promisseth, and to deale truely (when by his Soueraigne Prince he is in like sorte charged) then if he were to answer it vpon his corporall oath. So that we may conclude, that it is not vnlawfull or vngodly, to take an oath, that we will perforce some such matter whereof every particular is not afore hand, or at that very time remembred vnto vs, or can then be called to minde or knowne by vs in such distinct and speciall manner.

CHAP. 20.

That if the partie hath answered vpon his oath, it is neither vnlawfull, nor vngodly, to seeke to conuince him by witnesses, or other evidence, all if he be supposed not to haue deliuered a plaine and full truth.



Heir next and last exception (set out afore orderly to be spoken of,) which this sorte of men doe make vnto the manner of proceeding Ecclesiasticall, (being of a thing ensuing after the oath and examination) is, for that Iudges Ecclesiasticall doe not alwaies rest in that which is affirmed or denied, vpon the parties oath: but doe oft times proceede to a further enquire, by examination of witnesses, vpon the pointes denied by the partie. A man might iustly maruell, what should moue them to thinke so well of their owne single oathes, (& especially in their owne cause) as that they should thinke, that some indignitie is offered to them, onely because they are not perfectly beleeued; but that proofes (by witnesses) are after made (sometimes) to conuince them. But for this they bring also some pretence (as for the rest of their opinions) out of the Scriptures. It is said in the Epistle to the Hebrewes: that an oath for confirmation is a-  
mongst men, an ende of all strife. Whereupon they gather, that whatsoeuer they shall deliuer vpon their oathes, is ought to be final and peremptorie, to conclude y cause of necessitie, without any more adoe.

The vse of the oath, which is in that place spoken of, is especially and most properly appliable to two kindes of oathes. The first is an oath Promissory, when (for more assurance of the promise to be kept) the parties agree, that it shall be taken: which is argued by the circumstance of the place, as being brought to prooue the certentie of the Promissory oath, which God made vnto Abraham, and also by the word of Confirmation there vsed. Secondly, this place hath vse very



Azo. in Sum-  
ma de rebus  
creditis.

properly also, in the oath *De offiis*: when as either the one or the other of the parties is contented, to put the matter that is in variance, vpon his aduersaries oath: which if he thereupon shall take, it maketh an ende of the whole suite and strife. For in this case, he that so offered it, shall not be permitted to vie any contrarie proofes afterwards: because he made choise to haue the whole cause in variance composed betwixt them in that sorte.

It may also truly be answered so that place, that an oath indefinitely, is in deede a meanes provided, and tending to make ende of all strifes amongst men: but not that in euery cause and matter whatsoever, one mans single oath should therefore be sufficient, because many absurdities would follow of such an interpretation: as namely, that a mans oath in his owne cause should be as good and forcible, as any other two mens oathes touching the same matter. The law saith: *dictum unius, dictum nullius*. One singular deposition, though of a witnesse (who is not interested in the cause, and therefore the more indifferent) is not to be taken for a proofe. Then howe much lesse should a parties oath (whome the lawe presumes to be partial in his owne cause) be admitted for a concludent proofe, to his owne clearing or benefite?

Besides, if such their interpretation should be followed, then is this place contrary to sundry other places in the Scripture, which were blasphemie to imagine. For one witnesse shall not testifie against a person to cause him to die; but witnesses, therefore more then one. And by consequence, a mans owne witnesse (for and in his owne behoufe) is not sufficient. At the mouth of two or three witnesses, shall he that is worthy of death die: but at the mouth of one witnesse, he shall not die. Againe: One witnesse shall not rise against a man, for any trespassse, or for any sinne, or for any fault that he offenderh in: but at the mouth of two witnesses, or at the mouth of three witnesses, shall every word be established. Likewise in the Gospell: by the mouth of two or three witnesses, every word may be confirmed. Furthermore, it is written (saith Christ) in your lawe, that the testimony of two men is true. Moreover, S. Paul saith: in the mouth of two or three witnesses, shall every word stand. And againe: he that despiseth Moyses law, dieth without mercie, vnder two or three witnesses. And to Timothy in like manner: receiue none accusation against an Elder or Minister, but vnder two or three witnesses. Much lesse then (of any necessitie) shall a mans owne testimonie of himselfe, and for his owne benefite or clearing, be receiued for an vndoubted truth. The blind Pharisees could see so much, that it was absurd for any sinful man to arrogate so much



much to himselfe, that his owne witnesse touching himselfe, should suffice. Therefore they say to Christ, whom they tooke to be but man *Ioan. 8. v. 17.* onely, *thou bearest record of thy selfe, thy record is not true.* And Christ himselfe signifieth the like, for he saith: *If I should beare witnesse of my selfe, my witnesse were not true;* meaning that where there is no further testimonie for a man, then his owne selfe, there is no cause that other men should holde it for true, or rest in it as certeine. And therefore we see, that albeit the woman, whom her husband hath in *Ielou-* *se,* is put vnto a most stricte oath (with an imprecation and curse) *Num. 5. v. 22.* that *she is not defiled:* yet is there (by the lawe of God) appointed a further triall, and *she is to drinke the cursed water,* which by Gods secrete operation (giuing might vnto it) was of force both to reueale, and to punish her periurie (if she were forsworne) by making her (most lothsomely) to rotte aboue the ground, being yet aliue. *vsque ad 28.*

Of further inquirie and the equitie of it, after the oath taken by the partie: we haue also sundry examples in the Ciuill lawe of the *Romanes.* If an oath be taken by any man touching a legacie left vnto him by a Testament, or of the truth of any other instrument, this oath is not so to be rested in: but that all may be againe reuoked vpon proofes, made against that oath, least the lawes should seeme to permit a man to reape benefite by his owne wicked periurie. So if the Iudge (and not the partie) doe tender and deferre an oath to the other partie, if by some publike instrument, (viz. matter of record) or anylike sufficient matter, proofe may afterwards be made, of the falshood of such oath: it shall be reuoked, and all that dependeth vpon it. The reason hereof is assigned, for that it is but a kinde of doubtfull proofe. Furthermore, if either of the parties suing doe take oath that he hath neither giuen, nor promised any thing to the Iudge, if within ten moneths after the sentence giuen it shall be proued, that herein he hath sworne falsly, both the giuer and the taker, shal haue all their goods and lands confiscated, and shall be banished. So is the lawe also, after an oath taken of the truth of an *Inuentarie,* and (in respect of the proofe) is daily practised. For any of the Creditors or Legaries, may take vpon them to proue, that some thing is left out of the *Inuentarie:* which if they doe, the heire or executor shall forfeite double as much by that law, where (in this behalfe) it hath place and is in vse. *l. 13. C. de rebus creditis & iureiur.*

Yet that which in the two former examples is saide of punishing, is speciall vnto those two cases, and to such like, as the lawe doth specially so determine. For (ordinarily) the rule is, that if it happen, (and so fall out vpon proofes after ward) that the defendant hath deposed falsly in his personall answers (the cause being moued by







*conceale such offenders goods, and to examine them by their oathes, and by other wayes (as in discretion they shall thinke meet) vpon the specialty, certainty, true declaration, and knowledge of such offenders goods or debts owing to him: and if he shew not the whole truth (to be after prooued by witnessses, &c.) then he forfeiteth double the goods concealed. And the very* 13. Eliz. cap. 7. *like clause in that matter of Bankrupts, is established by a statute made in her Maiesties time.*

At the Common law, the Iudges doe not alwayes rest in an oath of a party, but do sometimes enquire futher of the truth of it; and do punish him also for taking a false oath, if he be thereof conuicted. One was brought into the Court as a pledge, and did sweare he might dispend fortie shillings land by yeere: yet the Court rested not in this oath, but examined the matter more straitly (vpon occasion that one dwelling in the same place, did affirme that the other might dispend nothing) and it being found, that he could dispend but twenty shillings by yeere, he was committed to the Fleet, till he had paid his fine. So that (both by diuine & humane lawes) we see neither reason, equity, nor practise for Iudges (necessarily) to rest in a supposed delinquents answer vpon his oath, without proceeding to the taking of any further proofs: whereby the lawfulnessse also of that oath (which I termed partly of *Purgation* and partly of *Enquiry*) is particularly approoued. P. 5. H. 6. fol. 25.

**T**Hus haue I as plainely as I could, and as briefly as the matter would suffer (in my rude maner) shewed vnto you my simple opinion in the points aforesaid, lately called into controuersie; and (by the way) in others also, wherein you haue so earnestly (almost) importuned me to trauell. If it doe (but as it is like) not satisfie you, impute it to the shortnesse of time, lacke of good leasure, and chiefly to your owne badde choise of me. If any thing, as (I doubt not) but very much may be mistaken, keepe you promise with me, and let this simple Treatise haue no more nor other readers of it, then I wish:

& so shall I haue lesse cause to doubt, but that the censures

of it will be nothing so sharpe, as (I feare) they may be iust, for want of skill in me, to deale in matters of this quality.

\* \* \*

FINIS.